

**INTELLECTUAL PROPERTY AS A TOOL FOR ECONOMIC
EVELOPMENT IN TANZANIA-THE CASE OF COPYRIGHT
PROTECTION**

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REQUIREMENT FOR THE DEGREE OF THE MASTER OF LAW IN
INFORMATION TECHNOLOGY AND TELECOMMUNICATION
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2013

CERTIFICATION

The undersigned certifies that he has read and hereby recommends for acceptance by the Open University of Tanzania (OUT) a dissertation titled “Intellectual Property as a Tool for Economic Development in Tanzania-The Case of Copyright Protection” in partial fulfillment of the requirements of the award of the degree of Master of Laws in Information Technology and Telecommunications (LLM IT & T).

.....

Professor Ian Lloyd

(Supervisor)

.....

Date

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I, **Frank Mukoyogo**, do hereby declare that this dissertation is my own original work and that it has not been presented and will not be presented to any other University for a similar award or any other award.

.....

Signature

.....

Date

DEDICATION

This work is dedicated to my late mother, Winnie Mukoyogo (RIP), one person who has had the biggest positive influence in my life.

ACKNOWLEDGEMENT

I greatly appreciate the financial assistance extended by my employer, National Microfinance Bank Plc in taking this course. Special thanks are also extended to my supervisor, Professor Ian Llyod for his time and guidance in the course of this project.

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ABSTRACT

It is now widely acceptable that copyright protection and intellectual property in general can be an effective tool for economic development through innovation and employment creation. However, just like any other developing country, the potential of intellectual property has not been used effectively to bring positive impact to the national economy. This study therefore sought to assess the existing legal framework of copyright protection in Tanzania in order to identify any weakness, and if available, assessing their implications they might have towards the growth of copyright related industries in Tanzania. In this research, data was purely based on documentary review. During the last decade, considerable steps have been taken by the Government of Tanzania in regulating copyright protection. This follows the accession of the Berne Convention in 1994, and five years thereafter followed the enactment of the Copyright and Neighboring Rights Act, 1999. However, it was revealed that copyright related matters in Tanzania are politically handled, with key stakeholders demonstrating lack of commitment and/or seriousness, little knowledge, limited financial resource and the poor performance of Copyright Society of Tanzania, which is basically attributed to its legal framework. In line with the findings, the study recommended the need of reforming the Copyright Society of Tanzania, through separation of the two functions (i.e. as a copyright office and a collective management organization); the need to undertake a comprehensive study on the role of copyright protection, and intellectual property in general; and the need of having education and awareness programs to key stakeholder of copyright law in Tanzania, particularly the law and policy makers.

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ABBREVIATIONS

AFDB	African Development Bank
ARIPO	African Regional Industrial Property Organization
CAP	Chapter
COSOTA	Copyright Society of Tanzania
EU	European Union
FCC	Fair Competition Commission
IMF	International Monetary Fund
OFCOM	Office of Communications
TCRA	Tanzania Communication Regulatory Authority
TRA	Tanzania Revenue Authority
Trips	Agreement on Trade Related Aspects of Intellectual Property Rights
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
USA	United States of America
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

LIST OF STATUTES

Tanzania

Statutes and Regulations

The Copyright and Neighboring Rights Act [Cap 218 R.E 2002]

The Merchandise Marks Act [Cap 85 R.E 2002]

The Trade and Service Marks Act [Cap 326 R.E 2002]

The Patent (Registration) Act [Cap 218 R.E 2002]

The Copyright (Licensing of Public Performance and Broadcasting) Regulations,
2003

The Copyright and Neighboring Rights (Productions and Distribution of Sound and
Audiovisual Recordings) Regulations, 2006

The Copyright and Neighboring Right (Registration of Members and their Works)
Regulations, 2005.

Kenya

The Copyright Act [Cap 130 R.E 2009]

Uganda

The Copyright and Neighboring Rights Act, 2006

United Kingdom

The Copyright, Designs and Patents Act, 1988

European Union

Directive No. 96/9/EC of the European Parliament and of the Council, of 11 March
1996 on the legal protection of databases.

Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the Term of Protection of Copyright and Certain Related Rights.

Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the Legal Protection of Computer Programs (Codified version).

Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on Rental Right and Lending Right and on Certain Rights related to Copyright in the field of Intellectual Property (codified version).

Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version).

Directive No. 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society.

WIPO ADMINISTERED TREATIES

The Berne Convention

The Wipo Convention

The WIPO Copyright Treaty

The WIPO Convention

LIST OF CASES

A&M Records INC v Napster 239 F.3d 1004.

Asia Pacific Publishing Pte Ltd v. Pioneers and Leaders (Publishers) PTE Ltd [2011]

SGCA 37 (Singapore, Court of Appeal, 27 July 2011)

Bamgoye v Reed and Others [2002] EWHC 2922

Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas

SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain,

Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek

Owen (C-403/08) and Karen Murphy Media Protection Services Ltd (C-429/08)

Frank Allan Bruvik v Emi Norsk Case 03-000482ASI-ELAG

Hyperion Records Limited v. Dr. Lionel Sawkins [2005] EWCA Civ 565

Ladbroke v. William Hill [1964] 1 WLR 273

LB Plastics Limited v. Swiss Products limited [1979] RPC 551

Norwich Pharmacal Co. v Customs and Excise Commissioners [1974] AC 133

Stevenson Jordan v. MacDonnell [1952] 1 T.L.R. 101

Twentieth Century Fox Film & Others v Newzbin Limited [2010] EWHC 608 (Ch))

Fox

Uganda Performing Rights Society v MTN (U) LTD The High Court of Uganda

(Commercial Division) Civil Suit No.287 of 2010

CHAPTER ONE

1.0 INTRODUCTION AND RESEARCH TECHNIQUES

“Mheshimiwa Naibu Spika, Kanumba amefariki, Rais anakwenda uchochoroni, Waziri Mkuu anakwenda uchochoroni ...pale kwa sababu tu kama Taifa tumeshindwa kabisa, kabisa kabisa kusimamia vitu vidogo, matokeo yake Wizara inakuwa maskini na wadau wake wasanii ni maskini....”¹

(When translated to English, *“Hon. Deputy Speaker, Kanumba is no more, the President had to go to the squatter area, the Prime Minister had to go to the squatter area just because as a nation, we have totally failed to manage small matters, as a result the ministry is poor, so are the artists...”*).

1.1 Background of the Problem

The scope of intellectual property is very wide, and cuts across all economic sectors. In general terms, intellectual property may be defined as a bunch of exclusive rights offered to creations of the human mind. According to the WIPO², intellectual property covers the literary, artistic and scientific works, performances of performing artists, phonograms, and broadcasts; inventions in all fields of human endeavor; scientific discoveries; industrial designs; trademarks, service marks, and commercial names and designations; protection against unfair competition; and “all other rights resulting from intellectual activity in the industrial, scientific, literary or

¹ These words were spoken by the shadow minister of youth and culture during seating no.2 of parliamentary session no.7. The Late Kanumba was the popular movie star and producer in Tanzania. With all his popularity, he was living in the squatter areas. The President and the Prime Minister had to go to the squatters to pay their tribute. Available at <http://www.parliament.go.tz/index.php/sessions/contribution/1644/2010-2015/18>

² See WIPO, Understanding Copyright and Related Right available at http://www.wipo.int/export/sites/www/freepublications/en/intproperty/909/wipo_pub_909.pdf

artistic fields. Intellectual property would thus protect a music composer for his piece of music, a manufacturing company for its trademarks, formulas and solutions, a technology company for its technological innovations and designs, a university faculty for its research, and a particular community for its customs and cultures.

Intellectual property has assumed greatest significance in the modern trade and ways of doing business. In some companies in the developed world, it has been reported that intellectual property related assets constitute more than 70% of the corporate assets³. Perhaps we are in that era where real property is of less significance compared to human creations.

The above notion may be supported with the recently global litigation between Apple and Samsung in the various parts of the world. The dispute had involved the design of smartphones and tablet computers. According to Forbes Magazine⁴, the battle involved fifty (50) lawsuits globally. Definitely, huge investments were involved in this lawsuit. It has been reported that an expert witness for Apple was paid US\$430 an hour, and had spent more than a year and a half working on evidence. Likewise one witness for Samsung was paid US\$1,000 an hour and had worked for 460 hours⁵. Of course, this is apart from Attorney's fees and other costs. Such investments prove how creations of the human mind have assumed greatest importance.

³ See Shapin R.J and Pham N.D(2007), Economic Effects of Intellectual Property-Intensive Manufacturing in the United States, available at www.sonecon.com/docs/studies/0807_thevalueofip.pdf

⁴ See <http://www.forbes.com/sites/michaelbobelian/2012/12/17/the-top-cases-of-2012/>. Samsung and Apple was a Forbes top case for 2012.

⁵ Apple's closing shot hits at Samsung 'copycat' docs, available at http://news.cnet.com/8301-13579_3-57497649-37/apples-closing-shot-hits-at-samsung-copycat-docs/

According to various reports and studies, it has been established that intellectual property is a powerful tool for economic development and wealth creation⁶. However, the potential of intellectual property is yet to be used effectively, particularly in the developing world. It is without question that Tanzania is one of such developing economies that have failed to utilize the potential of intellectual property. For instance, a chart hitting song in Tanzania is only associated with fame and not money. This is evidenced by a very common Swahili saying which goes like “*msanii bongo?*” (The word “*msanii*” translating to “artist” and “*bongo*” to Tanzania, meaning that an artist cannot really flourish/thrive in Tanzania. This has some truth because the popularity of music artists in Tanzania does not commensurately enhance their economic status. The situation is against the spirit of copyright protection which among other things, intends to ensure that creators of works are rewarded in monetary terms. It is the intention of this work to go through the regulatory framework of intellectual property in Tanzania, particularly on copyright protection with a view of proposing reforms in the law that will transform intellectual property to a tool for economic development.

1.2 Statement of the Problem

The regulatory framework of intellectual property in Tanzania is comprised of the Merchandise Marks Act⁷, the Trade and Service Marks Act⁸, the Patents (Registration) Act⁹, and Copyright and Neighboring Rights Act¹⁰. The country is

⁶ Study on the Economic Importance of Industries and Activities protected by Copyright and Related Rights in the MERCOSUR Countries and Chile available at

http://www.wipo.int/freepublications/en/copyright/889/wipo_pub_889_1.pdf

⁷ [Cap 85 R.E 2002]

⁸ [Cap 326 R.E 2002]

⁹ [Cap 217 R.E 2002]

also a signatory to a number of international instruments such as the Berne Convention for the Protection of Industrial Property, the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, the Patent Cooperation Treaty, the Convention establishing the World Intellectual Property Organization, the Paris Convention for the Protection of Industrial Property, the World Trade Organization (WTO) - Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (1994) etc.¹¹.

It is now widely accepted that intellectual property can be a tool for economic development through wealth and employment creation¹². This is because the essence of the intellectual property law lies at rewarding creativity and innovations, which at the end provides room for revenue generation, conducive environment of investment (for both local and through foreign direct investments), employment creation etc. However, the role of intellectual property in the Tanzanian economy remains unclear and unappreciated. It is high time for the intellectual property market in Tanzania to facilitate economic growth.

While it remains clear that successful operation of intellectual market in the Tanzanian economy depends on a number of factors (such as a steady market, technology, awareness of the general public on intellectual property matters), it is logical to raise an argument that an effective operation and legal framework of intellectual property are the vital tools of attaining economic development.

¹⁰ [Cap 218 R.E 2002]

¹¹ For the full list of international instrument see <http://www.wipo.int/wipolex/en/profile.jsp?code=tz>

¹² *ibid*

Like any other existing regulatory frameworks in Tanzania that are a result of “copy and paste” from foreign jurisdiction, the existing regulation on intellectual property is a replica of the outdated English legislations. The present Copyright and Neighboring Act of 1999 is a replica of the English Copyright, Designs and Patents Act 1988. The same have remained unchanged despite the fast changing environments brought by among other things, technology and globalization. Another good example is the existing Merchandise Marks Act which was enacted in 1963, but came into force on the 15th April 2005¹³. This is also the same for the Trade and Service Marks, enacted in 1986, but came into operation in 1994.

An effective regulatory framework has to reflect the socio-economic level of development and specific needs and challenges of the concerned territory. It is therefore important to identify the general qualities of an effective regulation that is in harmony with our circumstances and do away with a “copy and paste” tendency.

Most of the available literature on the subject jumps at proposing overhauling the entire regulatory framework of intellectual property and adopting legislations from developed jurisdictions such as the United Kingdom and United States of America. In general terms, the regulatory framework is often a reflection of a number of factors such as the socio-economic development, the prevailing challenges and the level of technology of a particular community. It is therefore improper to compare the circumstances and challenges of a Tanzania’s young economy with the likes of the United States of America, the United Kingdom etc.

¹³ By virtue of GN No.95 of 2005 published on 8th April 2005.

There is thus a need to come up with a regulatory framework that will carry along the general components and attributes of an effective and an up-to-date regulation that meets the international standards and is also suitable and practicable within Tanzanian circumstances.

1.3 Research Objectives

1.3.1 General Objectives

The main objective of the study is to review the existing regulatory framework of copyright protection in Tanzania.

1.3.2 Specific Objectives

The specific objectives of this research include:-

- i. To identify weaknesses within the existing intellectual property laws, policy and regulations in Tanzania, and assessing their implications they might have in the growth of the intellectual property market.
- ii. To identify a regulatory framework that suits the Tanzanian environment.
- iii. Recommend ways and means of improving the intellectual property laws, policy and regulations in Tanzania.
- iv. To raise awareness to our law makers and reformers to consider practicability of any proposed legislation before enactment.
- v. To raise awareness to the public in general on the substantive and procedural matters relating to copyright (i.e. rights of the authors, enforcement mechanisms etc).

1.4 Research Question

The research questions of this research include:-

- i. Does the existing socio-economic and legal framework supports the growth of intellectual property in Tanzania which, as stated above, goes hand in hand with economic development?
- ii. To what extent are the international rules on intellectual property relevant and practical to Tanzanian circumstances?
- iii. If not, what is the appropriate regulatory framework that suits the Tanzanian environment?

1.5 Significance of the Study

It is the intention of this piece of work to review the existing regulatory framework of intellectual property in Tanzania with a view to determine whether the law in Tanzania can facilitate economic growth. The research will go ahead to propose appropriate areas of reform that will address the available challenges and needs of the country.

The study will be of significant importance to the law reformers, as it will attempt to analyze the regulatory framework and come up with appropriate remedial measures. It will therefore act as a call to law makers and reformers to do away with the “copy and paste” tendency, and instead come up with a regulatory framework that has all attributes of an effective regulatory framework and that which addresses the socio-economic needs and challenges of intellectual property in practical terms.

1.6 Scope of the Study/Research

The scope of research is limited to the review of the existing regulatory framework of intellectual property in Tanzania, with a particular focus on copyright protection. The study will focus on whether the existing intellectual protection regulation can foster the economic development of Tanzania. In areas where weaknesses will be identified, the researcher will attempt to recommend practicable and suitable reforms that meet the socio-economic needs and challenges of Tanzania.

The research will contain the following chapters:-

1.6.1 Chapter One-Introduction and Research Techniques

This chapter contains an introduction to the research and the research techniques. The statement of the problem, literature review and the research methodology are covered in this part

1.6.2 Chapter Two- International Copyright Regulation and Good Practice

This chapter explores the international copyright regulation and good practice from international organization and selected jurisdictions. This will provide an insight on where Tanzania stands in terms of regulating copyright.

1.6.3 Chapter Three- Legal Framework of Copyright Protection in Tanzania

This chapter explores the legal framework of copyright protection in Tanzania. The discussion covers the existing legislation on copyright, regulatory framework, enforcement mechanism and other related matters.

1.6.4 Chapter Four-Market Analysis of Copyright-Related Industries in Tanzania

This chapter attempts to provide an analysis on how the social, economic and legal circumstances may influence the growth of copyright-related industries in Tanzania.

1.6.5 Chapter Five- Findings and Recommendations

A summary of findings is covered in this chapter.

1.7 Literature Review

It is the intention of this research to show that an effective operation and regulatory framework of intellectual property in Tanzania can be a tool for economic development. This prompted the researcher to go through a number of reports on the economic performance of Tanzania. On the other hand, in recent years, the world has witnessed significant recognition of intellectual property. As a result, a wide range of literature is available from a number of scholars, international organizations such as WIPO, UNCTAD, WTO etc. All these have been very useful and formed essential sources of data.

Tanzania is recognized as an attractive destination of investment due to its highest population in the region, its states of not being land-locked and being politically stable (ESRF 1997)¹⁴. However, it appears that the investment suitability in the country has not been fully utilized in order to attract economic growth. This is because Tanzania is ranked by the World Bank as one of the poorest countries in the

¹⁴ ESRF(1997) Diversity in the Tanzania Business Community:- Its Implications for Economic Growth, ESRF Policy Dialogue, Series No.005

world, with a GDP of US\$23.87/- million¹⁵, and nearly 2.4 million people being unemployed¹⁶. The reports have highlighted the economic performance and the rate of unemployment. An effective operation and regulation of intellectual property would have a positive impact towards the economy and unemployment in the country.

The poor performance of the economy on several occasions has been connected with the poor regulatory environment of doing business. This is despite the fact that the Government of Tanzania on several occasions has demonstrated its political will of transforming the country's economy through facilitation and promotion of the private sector by putting in place a regulatory environment that is to doing business¹⁷. However, the situation on the ground does remain a mystery.

According to the Heritage Foundation¹⁸, the overall regulatory framework of doing business in Tanzania is described as poor, despite regulatory reforms of commercial laws, whilst the World Bank describes the same as too limited and uneven. This message is further emphasized by the ESRF¹⁹ who have described the business regulatory environment as deficient. This data has been of great importance in demonstrating close inter-connection between regulation and economic performance. The argument of the researcher is that effective regulation can be a tool of economic

¹⁵ See www.worldbank.org/en/country/tanzania/overview, accessed on 11th May 2013

¹⁶ According to the AFDB, the unemployment rate in Tanzania constitutes 10.7% of the population. In the same report, the employment situation in the urban young is described as "critical". Available at www.afdb.org/en/countries/east-africa/tanzania-economic-outlook/

¹⁷ See www.tanzania.go.tz/privatesector.html

¹⁸ See www.heritage.org/index/country/tanzania

¹⁹ Ibid

developments, whereas an inappropriate regulatory framework is a bar to the economic development.

According to Idris (2003)²⁰, intellectual property is a powerful tool for economy development, but it is yet to be used to optimal effect in many countries, particularly in the developing world. This fact is substantiated by success stories in Brazil and India, where a dramatic economic growth was achieved following intellectual property reforms that started in early 1990s. For instance, according to the author, the foreign direct investment grew from US\$4.4 billion in 1995 to US\$32.8 billion in 2000. A young Tanzania economy has a lot to learn from these success stories.

Cornish²¹ has traced the historical background of intellectual property regulatory framework of most of the developing countries. According to the author, most of the developing countries are often finding themselves with an inheritance of protectionist laws from colonial days. This piece of work has confirmed the fact that most of the existing regulatory framework inherited from colonial times was not drafted to meet the specific needs of the Tanzanian environment, but rather to protect intellectual property assets of colonial masters. It therefore provides a logical basis that the regulatory framework needs to be analyzed.

Yu²² supports the idea that intellectual property is a tool for economic development, and went ahead to provide circumstances within which intellectual property is likely

²⁰ Idris K(2003), Intellectual Property: A Powerful Tool for Economic Growth, available at http://www.wipo.int/export/sites/www/freepublications/en/intproperty/888/wipo_pub_888_1.pdf

²¹ Cornish W.R (1996), Intellectual Property: Patents, Copyright, Trademarks and Allied Rights, 3rd Edition, Sweet and Maxwell, London.

²² Yu P.K, Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a Trips Plus Era, Daniel J. Gervais, ed., pp. 173-220, Oxford University Press, 2007 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=978301

to attract economic prosperity, such including the capacity of a local market to imitate foreign products (in such a scenario a strong intellectual property protection is required and vice versa) and viable market. The author's findings provide emphasis as to why an effective regulation is necessary. The high population in Tanzania is an added advantage to the success of intellectual property market.

Kihwelo²³ and Mahingila²⁴ share the same view to some extent. Both of them are of the view that a proper intellectual property framework in Tanzania can be achieved through formulation of national intellectual property. The two authors have however differed on the contents of that Policy. Mahingila calls for a policy that will integrate intellectual property in the national socio-economic cultural development. On the hand, Kihwelo advises that the state addresses complex and rapid developments in information technology and telecommunications technology, and also state in broad terms the contribution of intellectual property in the overall national economic development strategy.

In another piece of work, Kihwelo and Bullu²⁵ have attempted to explore the existing intellectual property regime in Tanzania with regards to its commitments and compliance to international conventions. It has been observed that Tanzania has not complied fully with some specific provisions of international instruments and the

²³ Kihwelo, P.F, Patents Protection in Tanzania: Some Legal and Policy Consideration for Reform, the Open University Law Journal, Vol 1, No.2, December 2007

²⁴ Mahingila E(2007), Building Intellectual Property Institution in Tanzania, A Paper Presented at the High Level Meeting-Kilimanjaro –Kempinski, Dar es Salaam, Tanzania .

²⁵ Kihwelo, P.F and Bullu S, A Review of Tanzania's Current Situation with regards to Intellectual Property rights, Policy Issues, Oppurtunities and Challenges, the Open University Law Journal, Vol.2, No.2, December 2008

legal framework is outdated and needs a total revamp. This piece of work has provided a useful historical background of intellectual property regulatory framework in Tanzania.

Mambi²⁶ on the other hand has tried to state what the law is in the developed jurisdictions such as United States and United Kingdom, and provided in general terms what is missing in our law books. The author is of the view that a number of issues and challenges are not covered by the local legislation, and calls for reform of the law through implementation of international instruments and adoption of foreign legislations. The author has however not discussed the suitability and practicability of such instruments in local circumstances.

Khan²⁷ traces the historical development of intellectual property in England, France and United States of America during their era of industrialization. The author went further to provide policy options regarding key issues on national regulatory framework for developing economies. Somewhere in this piece of work²⁸, the author had this to say:-

“.... Today’s developing countries, intellectual property harmonization has meant the exogenous introduction of rules and standards that may be ill-suited to their particular circumstances. In direct contrast, the major lesson that one derives from the economic history of Europe and America is that

²⁶ Mambi, A (2010) ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community, Mkuki na Nyota, Dar es Salaam.

²⁷ Khan Z.B, Intellectual Property and Economic Development: Lessons from American and European History, Commission on Intellectual Property, available at http://www.iprcommission.org/papers/pdfs/study_papers/sp1a_khan_study.pdf

²⁸ *ibid*

intellectual property institutions best promoted the progress of science and arts when they evolved in tandem with other institutions and in accordance with the needs and interests of social and economic development in each nation...”[Emphasis added].

This piece of work provides lessons to be learnt for the young economies, the likes of Tanzania, and will thus be a reliable source to raise a logical argument.

On his part, Wangwe et al²⁹ attempted to examine the institutional and regulatory capacities for intellectual property administration and enforcement in Tanzania. Unlike most of the studies that have been done in the country, the authors are of the view that the intellectual property framework is well documented but lacks an effective enforcement mechanism. The study provides a useful guide on the Tanzanian’s compliance towards international instruments (WTO and the TRIPS Agreement) and the general regulatory framework of intellectual property.

1.8 Research Design and Methodology

The researcher will mainly employ documentary research. This will involve the review of text books, legislations, government documents, case laws, journal and articles, research papers, newspapers. Data will be collected from the Open University of Tanzania library and through the internet. Data collected from these sources will provide the researcher with an in-depth understanding of the subject (both local and international content) and provide support to arguments in the course

²⁹ Wangwe et al; Commission on Intellectual Property Rights country Case Study for Study 9, available at http://www.cipr.org.uk/papers/text/study_papers/sp9_Tanzania_case_study.txt

of discussion. Data will also be collected from a number of international organizations such as the WIPO, WTO, and UNCTAD etc. This is because these organizations provide the best practice, model laws and recommendations on intellectual property regulations.

In the course of study, the researcher will often make reference to a number of foreign jurisdictions. Such include England and other common law jurisdiction. This is because the Tanzanian legal system is largely a legacy of the English legal systems (England being its former colonial master), and the law in England, as it stood in 1920 remains binding on our courts so far as there is a statutory lacuna and local circumstances permit the application of the under consideration, and as it stands generally, highly persuasive in our legislations and court decisions. In addition, data has also been collected from those countries that once had similar economic development level with Tanzania, but have made considerable progress of late. These are the likes of Vietnam, Malaysia, India etc.

CHAPTER TWO

2.0 THE INTERNATIONAL COPYRIGHT REGULATION AND GOOD PRACTICE

2.1 Introduction

The historical development of copyright protection is often associated with the growth and development of printing press in England in the 18th century³⁰. The first ever copyright law legislation in the world is said to be the Statute of Anne, enacted in the 1709³¹. Prior to the enactment of the Statute of Anne, the rights of the authors were not well protected, to the extent that the publishers and book sellers had a right to print, reprint, and publish, without the consent of the authors.

The Statute of Anne was enacted in order to encourage and promote the writing sector in England. The legislative framework prior to the enactment of the Statute of Anne offered no restrictive measures against the exploitation of books and other writings. The book sellers and publishers had unlimited rights of exploitation, whereas authors had little to benefit from fruits of their labor³². This situation was likely to discourage book writers, and ultimately could lead to the collapse of the writing sector. The rationale behind the enactment of the Statute of Anne is better reflected in the first paragraph of its Preamble, where it stated:-

“Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the

³⁰ <http://www.ipso.gov.uk/types/copy/c-about/c-history.htm> accessed on 30th July 2013

³¹ *ibid*

³² See <http://questioncopyright.org/promise> accessed on 30th July 2013

consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families: for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books... ”.[Emphasis added]

For the first time in the history of the copyright law, the Statute of Anne introduced protective measures against unauthorized exploitation of works without consent of an author³³. This meant that the right to print or reprint a book was exclusively vested to a creator of a work. Another notable feature of the Statute was the introduction of the fixed term within which an author could exercise right of protection³⁴. For the existing works, the Statute of Anne introduced the fixed term of twenty one (21) years from the commencement of the Act, and fourteen (14) years for the new works, commencing date of publication.

By then, the Statute of Anne appeared to be a successful piece of legislation on copyright. This is evidenced by the fact that most of the subsequent enactments of copyright legislation in the various jurisdictions were largely influenced by the Statute. For instance, the Statute was “copied and pasted” in America in 1780³⁵, which was almost eighty years after its enactment in England. It is perhaps in this era where the modern copyright law started to take shape.

³³ The Statute of Anne is available at http://avalon.law.yale.edu/18th_century/anne_1710.asp

³⁴ *ibid*

³⁵ See Bracha, O, the Adventures of the Statute of Anne in the land of Unlimited Possibilities: The Life of a Legal Transplant, Berkeley Technology Law Journal [Vol. 25:1427], available at http://btlj.org/data/articles/25_3/1427-1474%20Bracha%20050911.pdf

However, it was not until the 1886 when the Berne Convention was enacted. The available literature suggests that the international copyright regulation remained uncoordinated prior to the enactment of the Berne Convention in 1886³⁶. The intention of the convention was expressed to be “.....*the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works....*”³⁷. This has been achieved by setting up the minimum standards of copyright protection, establishing a system of equal treatment of copyright protection amongst its signatories etc.

It is more than a hundred years from the time when the Berne Convention came into force. Since then, the copyright regulation has been shaped by the international law and rules. Currently, there are a number of international and regional organizations, some of which are United Nations agencies engaged in policy making, technical support and capacity building etc in areas of copyright and intellectual property in general. These are the likes of WIPO, WTO, UNCTAD, UNESCO, European Union, ARIPO to mention a few.

To date, the Berne Convention represents one of the successful international instruments on copyright law, with signatories amounting to 166 states³⁸. It has remained an authority in copyright law across the world, and has also been incorporated by reference in a number of international instruments. A good example is perhaps to be found in Article 9.1 of the Agreements on Trade-Related Aspects of

³⁶ See http://www.iprightsoffice.org/copyright_history/ accessed on 30th July 2013

³⁷ See first preamble to the Berne Convention.

³⁸ See http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15, accessed on 24th July 2013.

Intellectual Property Rights (the TRIPS Agreements). Under the said Article, there is an obligation for all Members of the Agreement to comply with Articles 1 to Article 21 of the Berne Convention.

The next part of this work intends to have a general overview on the various international and regional copyright instruments (such as the Berne Convention, WIPO Copyright Treaty³⁹, TRIPS Agreements, EU Directives on copyright related matters) on the following selected areas: - (i) scope and basis of copyright protection; (ii) rights of an author (iii) regulatory responses towards the fast changing technology (iv) collective management of copyright (v) enforcement mechanisms and dispute settlement. This overview, when compared with the Tanzanian regulatory framework, will assist to provide an insight of where Tanzania stands in terms of key copyright regulatory matters.

2.1.1 Scope and Basis of Copyright Regulation

The scope of copyright protection within the international copyright regime covers “original literal and artistic works”. According to Article 2 of the Berne Convention, literal and artistic works covers books, pamphlets and other writings. Copyright may also subsist in translations, adaptations, arrangements of music and other alterations, collection of literary or artistic works such as encyclopedias and anthologies. With the fast changing technologies, the scope of “literal and artistic works” has been widened to include new innovative products that were not envisaged in the Berne

³⁹ Tanzania is not a signatory to the WIPO Copyright Treaty. However, it has been revealed that the Tanzanian Copyright law took note of the provisions of the Treaty during its enactment. See Mtetewaunga S, Current Status of Copyright Protection in Tanzania: Presentation of the New Copyright Act of Tanzania, WIPO Roving Seminars on Copyright and Neighboring Rights, Arusha, October 6-8, 1999 and Dar es Salaam, October 11-13, 1999, at page 4.

Convention. Currently, software, video games and computer programs are protected as literal works. This is provided for within Article 4 of the WIPO Copyright Treaty, which states that “*computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression*”.

The widened scope of copyright protection (covering software and computer programs) is also to be found in Article 1 of the Directive 2009/24/EC of the European Parliament and the Council of 23 April 2009 on the legal protection of computer programs (commonly referred to as the EU Software Directive)⁴⁰ and Article 10 of the Agreements on Trade-Related Aspects of Intellectual Property Rights⁴¹. According to Article 1 of the EU Software Directive, “computer programs” are protected as literary works within the Berne Convention.

A literary or artistic work will only receive copyright protection in the event it is an “original work” or constitute intellectual creation. The two phrase “original work” and “intellectual creation” are not defined in the Berne Convention, though have appeared in Article 2(3) and Article 2(5) of the Berne Convention, respectively. Under Article 2(3) of the Berne Convention, “*translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works*”. Again, within the wording of Article 5, “collection of literary or artistic works such as encyclopedias and anthologies, which by reason of

⁴⁰ According to Article 1 of the EU Software Directive, “computer programs” are protected as literary works within the Berne Convention.

⁴¹ According to Article 10 of the TRIPS Agreements, “*computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention*”.

the selection and arrangement of their contents, constitute intellectual creations shall be protected as such...”

The phrases “original work” or “intellectual creations” are very crucial in copyright law. The two provides the basis within which copyright may subsist to a particular piece of work. On several occasions, the English judiciary has been called upon to determine the tests of “originality” and/or “intellectual creations”. This is because the two aforementioned phrases are also found in English Copyright, Designs and Patents Act, 1988. For instance, in *Hyperion Records Limited v. Dr. Lionel Sawkins*⁴², a compilation of a list of Lalande’s music dated in the 17th and 18th century was held to be copyright protected due to the degree of effort, skill and time spent by the author in compiling the list. In *Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen*⁴³ and *Karen Murphy Media Protection Services Ltd*⁴⁴, it was stated that copyright could not subsist in sporting events, as there was no room for creativity.

In the words of Lord Reid in *Ladbroke v. William Hill* (1964), the word “original” does not demand original or inventive thought, only that the work is not copied and significantly derived from the author. In view of the foregoing, creativity is a basis within which a particular work can be copyright protected. Creativity will thus be

⁴² [2005] EWCA Civ 565

⁴³ (C-403/08)

⁴⁴ (C-429/08)

measured against the employed degree of labor, skill, effort, time etc, in the sense that no one will be able to appropriate the result of another's labor (LB Plastics Limited v. Swiss Products limited⁴⁵).

2.1.2 Rights of an Author

Copyright law, confers a right holder with economic and moral rights over a piece of an original work. The range of rights is to be found in Article 8, 9 and 11 of the Berne Convention (for the economic rights) and Article 6 (for the moral rights). The economic rights are related to monetary benefits of an author, and include the right of translation, reproduction, public performance, whereas moral rights are in connection with the integrity and reputation of an author, and include a claim of authorship, to object to certain modifications and other derogatory actions etc. The right so conferred to an author within the Berne Convention is the entire life of the author plus fifty years (Article 7(1)).

2.1.3 Regulatory Responses Towards Technology

Like any other areas of law, copyright law has also been a victim of the fast changing technology. Most of the national legislations and international rules were enacted without envisaging technology. A number of new technologies, particularly the internet can facilitate convenient ways of copying, distributing and making works available to the public. The internet has provided one of those easiest means of infringing copyright. However, to date, there are a limited number of national laws and international regulations that have been shaped in response to the

⁴⁵ 1979] RPC 551

technological changes. At the international arena, the WIPO Copyright Treaty was enacted in order to introduce new international rules that will adequately cover, among other things technological developments⁴⁶.

It has been reported that 23.76% of internet traffic is estimated to be infringing⁴⁷. In a study conducted by IFPI in 2006⁴⁸, it was reported that there were 20 billion illegal download of music files each year. The illegal downloads through the internet are mostly conducted through peer to peer technologies.

A Peer-to-peer files sharing has been defined as “*the trading of files in a network of peer nodes. A node is a device such as a computer, a personal digital assistant (PDA) or a cell phone, which is connected as part of a network.*” A peer to peer arrangement is best described by Larusson (2009)⁴⁹. According to the author, a peer to per arrangement constitutes (i) the person uploading copyright material onto the hard drive of a computer and granting their peers access to such content through a share folder; (ii) the person accessing material on the shared folder; (iii) the peer to peer operator who makes the sharing possible; and (iv) the internet service provider who provides access to the internet.

In the above described scenario, a range of economic rights are likely to be infringed by a person who uploads the content, a person who is accessing and downloading a

⁴⁶ See the Preamble to the Wipo Copyright Treaty

⁴⁷ See www.documents.envisional.com/docs/envisional_internet_usage_Jan2011.pdf

⁴⁸ Technical Options for Addressing Online Copyright Infringement available at https://www.eff.org/files/filenode/effeurope/ifpi_filtering_memo.pdf

⁴⁹ Vincents O.B, International Journal of Law and Information’s Technology, Vol 16, No.3 available at <http://ijlit.oxfordjournals.org>

material from the internet, a peer to peer who facilitates file sharing etc. It is obvious that these acts will automatically fall within the provisions of Article 8 of the WIPO Copyright Treaty. The wording of Article 8 states:-

“...authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually choose by them”.

Though in general terms the involvement of a copyright content in a peer to peer arrangement constitutes infringement, the illegal file sharing has raised a lot of legal issues. For instance, according to BIS (2010), it was reported that there were 6.5 million people in the UK were involved in online infringement⁵⁰. How do you fight against this huge number? Again, what could be the liability of internet service providers? All these constitute important matters in addressing illegal file sharing.

The UK and USA demonstrates deliberate legislative initiatives towards combating illegal file sharing. With the English Digital Economy Act, 2010, one of the legislative attempts of fighting illegal online file sharing is the enactment of the rule of the English case of *Norwich Pharmacal Co. v Customs and Excise Commissioners*⁵¹, compelling internet service providers to provide a list of copyright

⁵⁰ The Digital Economy Act: Impact Assessment, available at <http://ialibrary.bis.gov.uk/uploaded/Digital-Economy-Act-IAS-final.pdf>

⁵¹ 1974]RPC 101. This order is sought where the wrongdoers cannot be identified. An order will therefore be issued against a third party who can identify the wrongdoers to disclose such information to the applicant on request.

infringers to a right holder upon request. A good illustration on forms of liability may well be provided through case laws from Europe and America:-

In *A&M Records INC v Napster*⁵², the defendant was found liable for the direct copyright infringement under the contributory copyright infringement. The defendant had facilitated transmission of illegal music files among its users, and there was evidence that he had knowledge of the infringing activity. In another case of *Twentieth Century Fox Film & Others v Newzbin Limited*⁵³, the defendant provided a platform to its users to search and download copyright content. The defendant was held to be liable for authorization. In *Frank Allan Bruvik v Emi Norsk*⁵⁴, where it was held that the defendant's act of publishing the hypertext link to the uploaded files amounted to illegal publication of music files.

It can thus be summarized that the legislative response towards online file sharing has centered on the following premises:- (i) imposing certain obligations to internet service providers; (ii) legislation shaped to fight mass infringers, rather than individuals; (iii) new forms of liability, even if where there is no reproduction, copying or distributing (as in the case of *Cooper v Universal Music of Australia Pty Ltd*)⁵⁵.

2.1.4 Collective Management of Rights

Copyright in itself grants exclusive economic and moral rights to an author of an

⁵² 239 F.3d 1004

⁵³ [2010]EWHC 608 (Ch)

⁵⁴ Case 03-000482ASI-ELAG

⁵⁵ [2006]FCAFC 187

original work. In this regard, no exploitation of such rights (reproducing, copying, making available to the public etc.) is permissible without the consent of an author. However, there are situations where an author of a work can enter into an arrangement with a collective management organization to administer his work. According to the EU Commission Recommendation of 18 May 2005 on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services⁵⁶, management of copyright and related rights includes: - *the grant of licenses to commercial users, the auditing and monitoring of rights, the enforcement of copyright and related rights, the collection of royalties and the distribution of royalties to right-holders*”⁵⁷.

According to the WIPO⁵⁸, “*an average of 60,000 musical works is broadcasted on television every year, so thousands of owners of rights would have to be approached for authorization*”. In such a situation, the collective management organizations come to play in order to provide a linkage between right holders and users. Right users (televisions and radios) would therefore have authorization from copyright owners in an easy way, and on the other hand, facilitate collection and distribution of royalties thereof to copyright owners.

There exist at least two forms through which collective management organizations are established and operated. One of such form is where a collective society is a

⁵⁶ The Commission Recommendation are available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005H0737:EN:NOT>

⁵⁷ See Article 1(a) of the Commission Recommendation. Ibid

⁵⁸ WIPO, Collective Management of Copyright and Related Right, available at http://www.wipo.int/about-ip/en/about_collective_mngt.html#P67_8306

creature of statute and performs dual roles, i.e. as a collective management organization and at the same time as a copyright office. This model is found in Tanzania pursuant to the Copyright and Neighboring Rights Act. The other model is where a collective management is solely established and operated by members (i.e. registered right holders), as a private entity⁵⁹. This model is to be found in the UK. In East Africa, it is practiced in Kenya⁶⁰ and Uganda⁶¹. Perhaps, one of the notable advantages of the latter model compared to the former is the fact that collective management organizations operated by members do not depend on government subsidy, but rather depend on application fees and administrative fees. In this regard, such organizations usually strive to have enough members, in order to lessen the administrative costs.

In some of the jurisdictions, collective societies have been entering into reciprocal arrangement with similar organizations in other countries in order to cooperate in the cross-border licensing and collection of royalties within their national boundaries. For instance, in the case of *Uganda Performing Rights Society v MTN (U) LTD*⁶², it was revealed that the Plaintiff had a reciprocal arrangement with Performing Rights

⁵⁹ In England, there are operated as Companies limited by guarantee and not for profit. See the set and operation of Designs and Artists Copyright Society, a collective society established by artists for artists in order to protect artists' rights. Available at www.dacs.org.uk/DACSO/media/DACDOCS/DACS_Members_Charter.pdf?ext=pdf

⁶⁰ This is pursuant to the Kenya Copyright Act, 2001. According to Section 46 of the Kenyan Act, collective management is open to person or association subject to the approval of the Kenya Copyright Board. The Kenyan Act is available at http://portal.unesco.org/culture/en/files/30229/11416612103ke_copyright_2001_en.pdf/ke_copyright_2001_en.pdf

⁶¹ Pursuant to Section 57 of the Ugandan Copyright and Neighbouring Rights Act, 2006, collective societies are registered by the Registrar of Companies. The Ugandan Act is available at <http://www.aatf-africa.org/userfiles/ug001en.pdf>

⁶² The High Court of Uganda (Commercial Division) Civil Suit No.287 of 2010 available at <http://www.ulii.org/ug/judgment/commercial-court/2012/136>

Society of UK, for purpose of effective management of copyright in their two countries. In this matter, the Plaintiff sought to enforce payment of royalties for the performance of the English band in Uganda, pursuant to the reciprocal contract it had entered with the Performing Rights Society of UK⁶³.

An effective operation of the collecting societies has already been a success in the various parts of the world. A study conducted by IFRRO (2003)⁶⁴ revealed that substantial earnings totaling 380 million euros have been collected globally for the benefit of authors and publishers. However, the collecting societies are now operating in a challenging environment, mainly because of the fast changing technology.

It has been pointed out that sound regulation is thus necessary for ensuring proper and effective performance of collecting societies. Accordingly, the GESAC (2012)⁶⁵ proposes objectives that need to be carried along in an effective regulation. These includes:- (i) ensuring transparent functioning; (ii) ensuring efficient and democratic governance, where right holders are central to decision making; and (iii) helping online services to develop across, while ensuring protection of the rights of creators and the economic value of their works.

⁶³ In this matter, the Plaintiff's case could not succeed on the basis of technicalities. The High Court of Uganda was of the view that the Plaintiff failed to prove the cause of action against the defendants. Notwithstanding that, the judgment remains a useful authority in East Africa on the enforcement of collective management of rights.

⁶⁴ WIPO & IFRRO (2005), Collective Management in Reprography, available at http://www.wipo.int/export/sites/www/freepublications/en/copyright/924/wipo_pub_924.pdf

⁶⁵ GESAC'S Main Comments on the Proposal for a Directive on Collective Management ("Draft Directive") available at http://www.gesac.org/eng/homepage_en/download/gesac-position-paper-30-oct-2012-121vd12-final.pdf

In support of the importance of collective societies, the European Union is in the verge of coming up with the Directive of Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services⁶⁶. The intended Directive aims at;

“ensuring that right holders have a say in the management of their rights and envisages better functioning collecting societies as a result of the set standards all over Europe. The proposed directive will also ease the licensing of authors' rights for the use of music on the Internet⁶⁷.”

Having looked at the ongoing legislative process of the proposed EU Directive on Collective Cross-Border Management of Copyright and Related for Legitimate Online Music Services, the following features have been revealed:-

i. The need of ensuring the better governance, greater transparency and accountability of collecting societies

Governance is achieved through the following obligations on the part of the collective societies:- to act in the best interests of their members; to act on equality, regardless the basis of category of membership; to informing right holders of their rights before obtaining their consent to act; any decision to accept or reject membership to be based on objective criteria; to keep updated record of their members; any investment to be based on the best interests of the members; to pay royalties regularly and diligently; negotiations between right holders and collective

⁶⁶ A draft proposal is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0372:FIN:EN:HTML>

⁶⁷ See Management of Copyright and Related Rights available http://ec.europa.eu/internal_market/copyright/management/index_en.htm

societies to be conducted on good faith; making available to their members effective and timely mechanisms of dispute settlement.

In East Africa, the copyright laws in Kenya⁶⁸ and Uganda⁶⁹ have demonstrated means and ways through which the collective societies can be operated on principles of governance, based on the existing laws and regulations. For instance, under Section 57 of the Ugandan Copyright Act, registration of collective societies is conducted by the Registrar of Companies. Technically, this means that collective societies in Uganda are operated based on the principles of good governance of operating companies. Whereas, transparency is achieved through the exercise of diligence in the collection and management of services; a restriction on the collective society to use rights revenue and any income derived from rights revenue; collective organizations to specify whether and to what extent there will be deductions from royalties to be distributed; on annual basis, provide to each right holder the rights revenue collected, the amounts due to the right holder, deductions made (managements fees and any other deductions)

Accountability on the other hand to be achieved through conducting a general meeting of the members at least once a year; existence of a supervisory functions responsible with monitoring the day to day activities of the society; adequate representation in the decision making bodies of collective managers.

⁶⁸ Ibid

⁶⁹ Ibid

ii Rights Holders to have a Right of Choosing a Collective Right Manager of his Choice and to have the Rights Withdrawn from a Collecting Society

Throughout this part of the work, it has been revealed that the Collective Management of Copyright is of crucial importance for the growth of the copyright market. This is because they create a coordinated initiative in protecting and enforcing copyright among rights owners. Such however need to operate based on principles of governance, accountability and transparency. The proposed EU Directive on Collective Management of Copyright provides a useful content and set up of these organs.

2.1.5 Enforcement Mechanisms and Dispute Settlement

Enforcement is one of the key areas of copyright law. They provide the means and ways through which a right holder can seek redress in the event there is a violation of his copyrights. It is logical to argue that copyright law will not be of any significance in the absence of adequate and effective enforcement and dispute settlement procedures. This is further emphasized by the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 (the EU IP Enforcement Directive), in recital 3 where it states:-

“However, without effective means of enforcing intellectual property rights, innovation and creativity are discouraged and investment diminished. It is therefore necessary to ensure that the substantive laws on intellectual property..... In this respect, the means of enforcing intellectual property rights are of para-mount importance.....”

The provisions on enforcement and dispute settlement of copyright related matters have appeared in a number of international rules. These include the Berne Convention, WIPO Copyright Treaty, the TRIPS Agreement, the EU IP Enforcement Directive etc. Some of the features of the copyright enforcement mechanisms includes:-

- (i) The author/or copyright owner to have a right to institute copyright infringement proceedings (Article 15 of the Berne Convention). However, the EU IP enforcement Directive (under Article 4) provides further persons with locus standi for institution of proceedings. These include the right holders, licensees, collective rights management, and professional defense bodies.
- (ii) National laws to provide for effective actions against copyright infringement, including timely remedies to prevent infringement and remedies which constitute a deterrent effect. (See Article 14 of the WIPO Copyright Treaty, Article 41 of the TRIPS Agreement).
- (iii) Procedures of copyright enforcement to be fair and equitable. This is measured against unnecessary complications, costs or entailing unreasonable time limits or delays (Article 41(2) of the TRIPS Agreement).
- (iv) Decisions on the merits of the case to be in writing and reasoned. They should be based on evidence in respect of which the parties were offered opportunity to be heard (Article 41(3) of the TRIPS Agreement).
- (v) There should be an opportunity for a judicial review in civil law (Article 41(4) of the TRIPS Agreement).

- (vi) There judicial authorities to have authority to issue injunctions, order the infringer to pay damages, order destruction of goods found to be infringing, order the infringer to inform the right holder of the identity of third person involved in the production and distribution of the infringing goods (Article 44, 45, 46, 47 of the TRIPS Agreement and Article 8, Article 10, Article 11, Article 12 and Article 13 of the EU IP Enforcement Directive).
- (vii) Provision for criminal procedures and penalties in cases of copyright piracy. These to include imprisonment or monetary fines sufficient to provide deterrence. (Article 61 of the TRIPS Agreement).
- (viii) The judicial organs may order dissemination of information concerning the decision, including displaying the decisions and publishing it in full (Article 15 of the EU IP Enforcement Directive). The essence of this provision is well expressed under Recital 27, where it states:-

“To act as a supplementary deterrent to future infringers and to contribute to the awareness of the public at large, it is useful to publicize decisions in intellectual property infringement cases”.

2.2 Conclusion

This part aimed at highlight the selected areas that are sought to be key for an effective operation of a copyright market. Attempts have made been made to review a number of international instruments and good practice from several jurisdiction. The analysis in this part will offer a basis for conducting a comparative study with the existing regime in Tanzania.

CHAPTER THREE

3.0 THE LEGAL FRAMEWORK OF COPYRIGHT LAW IN TANZANIA

3.1 Introduction

Intellectual property related regulation is not a new thing in Tanzania. The first intellectual property regulatory framework in the region traces its origin in the 1924, in the then colonial Tanganyika⁷⁰. As with the other British Colonies, the Imperial Copyright Act, 1911⁷¹ was adapted in the region by virtue of its Section 1(1) which extended the provisions of the Act throughout the parts of His Majesty's dominions, and the provisions of the Tanganyika Order in Council of 1920 which established the Tanganyika colonial territory. In colonial Tanganyika, it was referred to as the Copyright Ordinance Cap 128 of 1st August 1924⁷².

Intellectual property in the region is therefore directly linked with the coming of the Europeans in East Africa during colonial times. Although history books reports that the indigenous in the colonial territories were already involved in various innovative and creative activities⁷³, the colonial intellectual property regulation did not take into account whatsoever such creations. The available literature suggests that the rules of intellectual property regulation during that era were meant to safeguard the interests of the colonial book writers and publishers, who principally wanted to exercise

⁷⁰ The Ministry of Industry, Trade and Marketing (2010), Intellectual Property Right in Tanzania, available at www.wipo.int/wipolex/en/text.jsp?file_id=216618

⁷¹ Available at http://www.legislation.gov.uk/ukpga/1911/46/pdfs/ukpga_19110046_en.pdf, accessed on 30th July 2013

⁷² Ibid.

⁷³ Benedict, The Role of Traditional Skills and Techniques in the Development of Modern Science and Technology in Africa, International Journal Of Humanities And Social Science Vol. 1 No. 13 [Special Issue – September 2011] 178 Available At [Http://www.Ijhssnet.Com/Journals/Vol_1_No_13_Special_Issue_September_2011/23.Pdf](http://www.Ijhssnet.Com/Journals/Vol_1_No_13_Special_Issue_September_2011/23.Pdf)

control over the colonial markets⁷⁴. This proves the historical fact that the colonial territories were meant to provide raw materials, labor and market for their manufactured goods. However, it may appear logical to argue that while no formal intellectual property frameworks existed prior to colonialism, the indigenous technical know-how was preserved within the family in what could be referred to as “trade secrets”.

Soon after the independence, the Copyright Ordinance was repealed and replaced by the Copyright Act No.61 of 1966. Thereafter, the 1966 Act was also repealed and replaced by the current Copyright and Neighboring Rights Act, 1999. According to Mtetewaunga (1999)⁷⁵, the enactment of the 1999 Copyright Act was “*due to scientific and technological development, pressure from authors, actors, and musician the accession by this country to international treaty on this subject*”. There is however media reports that the 1999 Copyright Act will soon be reformed⁷⁶.

In summary, the intellectual property regulation in the region has passed in two eras, that is, during the colonial administration and the post-independence period. The post-independence period may further be categorized into the socialist regime and in the liberalized trade economy. The intellectual property situation we are currently in has in one way or another been shaped by the historical and economic influences. For instance, in the colonial era, the intellectual property regime was not of any

⁷⁴ Peukert, A, (2012), The Colonial Legacy of the International Copyright System available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2057796

⁷⁵ At Page 3, Ibid

⁷⁶ Tanzania Daily News, Tanzania: Copyright, Neighboring Rights Act Set for Review Next Year” AllAfrica 16th May 2013 available at <http://allafrica.com/stories/201305160353.html>

significance to the local community. Again, in the socialist environment where the economy was publicly held, the private ownership and the economic exclusive rights of an author were of no importance. It is in the free trade economy era where the intellectual property regime was significantly transformed.

3.2 The Copyright and Neighboring Rights Act, 1999

In Tanzania, the copyright law is to be found in the Copyright and Neighboring Rights Act, 1999 (the Act). The Act came at the time when the country was undergoing significant regulatory reforms that saw Tanzania moving away from a socialist economy to a free trade economy. The intention of the Act is *to make better provisions of copyright and neighboring rights in literary, artistic works and folklore*. Indeed the law in Tanzania has better provisions of copyright protection and related rights.

This is because the Act was enacted in compliance to the Berne Convention. However, the facts on the ground display a different perspective. The available data shows that the estimated market of tapes and audio CDs in 2011 reached Tshs.20 Billion⁷⁷. Another report has indicated that the Tanzanian's GDP out of music alone can reach Tshs.71 Billion, that being almost 0.5% of the current GDP. However, the existing revenue from musical works alone constituted only 12% of the total generated revenue⁷⁸.

⁷⁷ See the Contribution made by the then Minister of Industry, Trade and Marketing during parliamentary session no.4, question no.322, on 27th July 2011, available at <http://www.parliament.go.tz/index.php/sessions/questions/1576/2010-2015/1>

⁷⁸ Report available at www.parliament.go.tz/docs/reports/76e41-hosiana-nkamia-2nd-draft.doc

3.2.1 Applicability of International Instrument in Tanzania

Tanzania is a signatory to various international instruments on the intellectual property⁷⁹. In the copyright area, Tanzania is a signatory to the Berne Convention for the Protection of Literary and Artistic Works since July 25, 1994. The Berne Convention, among other things provides for the minimum requirement for the copyright legislation. It has however been observed that the country has not implemented the Convention in full, but rather some specific provisions of the Convention⁸⁰.

3.2.2 Scope and Basis of Copyright Protection in Tanzania

Tanzania being a signatory to the Berne Convention, copyright protection is conferred to authors of original literary and artistic works. Under the said Act, literary and artistic works includes in particular:- (a) books, pamphlets and other writings, including computer programs; (b) lectures, addresses, sermons and other works of the same nature; (c) Dramatic and dramatic-musical works; (d) musical works (vocal and instruments), whether or not they include accompanying words; (e) choreographic works and pantomimes; (f) cinematographer works, and other audiovisual works; (g) works of drawing, painting, architecture, sculpture, engraving, lithography and tapestry; (h) photographic works including works expressed by processes analogous to photography; (i) works of applied art, whether handicraft or produced on an industrial scale; (j) illustrations, maps, plans, sketches

⁷⁹ A full list is to be found at <http://www.wipo.int/wipolex/en/profile.jsp?code=tz>

⁸⁰ See Kihwelo P.F and Bullu S (2008), A Review of Tanzania's Current Situation with regards to Intellectual Property Rights Policy Issues:-Opportunities and Challenges, the Open University Law Journal, Vol.2, No.2, December 2008.

and three dimensional works relative to geography, topography, architecture or science.

Unlike patents and trademarks which require a prior prescribed registration process, copyright protection is created solely by operation of the law. Protection is thus granted by the sole fact of creation, irrespective of their form or expression, quality and the purposes for which they were created, provided that such works meet the minimum criteria set out in law. However, the Act provides optional registration of copyright works for purposes of collective management of rights⁸¹.

One of the criteria under the Act is the requirement of “originality”. The wording of Section 5(1) of the Act on “*original literary and artistic works*” is similar to the wording of Section 1(a) of the English Copyright, Designs and Patents Act, 1988. The wording under Section 5 of the Tanzanian Copyright law states:-

5(1) “*Authors of original literary and artistic works shall be entitled to copyright protection for their works under this Act.....*”

Where its English counterpart states:-

“1 (1) *Copyright is a property right which subsists in accordance with this Part in the following descriptions of work—*

(a) *original literary, dramatic, musical or artistic works...*”

⁸¹ See Section 47(b) of the Act.

The English cases in Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owe and Karen Murphy Media Protection Services Ltd would thus be of assistance in the interpretation of the requirements of originality.

The copyright protection in Tanzania may also be extended to what are referred to as “derivative works”. According to Article 3(2) of the Berne Convention, derivative works includes translations, adaptations, arrangements of music and *other alterations of a literary or artistic work* (emphasis added). This means that derivative works can be copyright protected as original works, without affecting copyright in the original work.

Fixation is another criterion for copyright protection. In the words of Article 2 of the WIPO Copyright Treaty, “*copyright protection extends to expression and not ideas, procedures, methods of operation or mathematical concepts as such*”. However, the wording of the Berne Convention is open, and has left it to the national legislation to determine what works in general or any specified categories will need to meet the fixation requirement for purposes of copyright protection. Within the Section 4 of the Act, the requirement of “fixation” is met where there is an “*embodiment of sounds or images in a material sufficiently permanent or stable to permit them to be perceived, reproduced or otherwise communicated during a period of more than transitory duration*”. In this regard, for a copyright to exist, a work needs to be

expressed in an acceptable statutory form. For example, one of the requirements for copyright protection in a performance under Section 3(3) of the Act is that “performance is fixed in a phonogram or in audio-visual form”. Essentially, one of the essences of the requirement of “fixation” might be for evidentially purposes in the event there is a copyright claim.

3.2.3 Rights of an Author and Free Use

In accordance with Section 15(1) of the Act, copyright ownership (sometimes referred to as “the right of authorship” is vested to the first author or authors who have created the work. For the purposes of the Act, an author is limited to the natural person who created the work. This position of the law was recently confirmed by the Supreme Court of Singapore in the case of *Asia Pacific Publishing Pte Ltd v. Pioneers and Leaders (Publishers) PTE Ltd*⁸², where the court was of the view “*that incorporated bodies were never contemplated to have been “author” for the purpose of copyright. It would be absurd to suggest that a company could have a life span, let alone generations of heir*”⁸³.

The right of authorship comes along with a bunch of exclusive economic and moral rights, for a specified statutory period, i.e. the life of the author plus fifty years after his death. The concept of authorship is therefore consequently fundamental to copyright, as it is a channel through which the legal rights flow. The legal rights are

⁸²The Supreme Court of Singapore in this case was prompted to determine who is an “author” for copyright purposes. This is because the Singapore Copyright Act 1987 is silent as to the definition of “author”. The Court had to therefore make a judicial finding as to who is an author. See [2011]SGCA 37(27 July 2011) available at <http://www.commonlii.org/sg/cases/SGCA/2011/37.html>

⁸³ See para 60. Ibid

inclusive of economic and moral rights.

Copyright in Tanzania is protected within the provisions of the Berne Convention. Within the Act, there is a wide range of economic rights. The essence of economic rights is to reward an author in monetary terms for the skill, creativity, labor and investments in a work, and at the same time, restricting the general public against any unauthorized exploitation of a work that is likely to affect the author's remuneration. The economic rights⁸⁴ includes reproduction of the work, distribution of the work, the rental of the original or a copy of an audio-visual work, public exhibition of the work⁸⁵, translation of the work, broadcasting of the work, other communication to the public of the work and importation of works. In view of the above, any act that is likely to interfere with the rights of an author is enforceable and punishable in law.

Unlike economic rights which are associated with financial advantage of an author, moral rights on the other hand are connected with the recognition, honor, reputation and integrity of an author. Under the Act, the moral rights of an author are listed under Section 11. These include:- (a) to claim authorship of his work, in particular that his authorship be indicated in connection with any of the acts referred to in connection with the economic rights, except when the work is included by means of photography, sound or visual recording, broadcasting or distribution by cable; (b) to

⁸⁴ The Tanzanian Copyright Act has basically adopted the economic rights found in the Berne Convention and the WIPO Copyright Treaty.

⁸⁵ In accordance with Regulation 3 of the Copyright (Licensing of Public Performances and Broadcasting) Regulations, 2003, public performance is restricted without a prior license issued by a Tanzanian collective society.

object to and to seek relief connection with, any distribution, mutilation of other modification of, and any other derogatory action in relation to, his work, where such action would be or is prejudicial to his honor or reputation.

As it was pointed out earlier, the right of authorship is automatically vested to first author or authors who have created the work. However, an exception to this rule is where *a work is created by an author in the course of fulfillment of his duties under a contract of service or employment*, as provided for under Section 15(4). In such a situation, ownership of copyright will be vested to an employer of an author. The underlying principle is the fact that an employer should be able to benefit from the wages he is paying an employee. There will thus be an assignment by operation of law to an employer of an author, unless there is an agreement to the contrary.

In law, the test to determine whether a particular act was done in the course of employment has never been easy. This is a question of fact, and courts of law would consider a number of circumstances within which creation of a particular work was made, and whether the same fell within the course of employment. For instance, in *Stevenson Jordan v. MacDonnell* (1952), the court had to look on the job description of an employee. In this case, first ownership of public lectures was given to an accountant instead of a firm he was working for. This was because the plaintiff was employed as an accountant and that the public lectures were not made under the contract of service. In another case of *Bamgoye v Reed and Others*⁸⁶, the court had to consider a number of factors such as an obligation of the employer to give work and wages for the performed work, if there was a job description, whether an

⁸⁶ [2002] EWHC 2922

employee had an obligation to attend to work etc.

As it was pointed out earlier, exploitation of copyright content is restricted without a prior authorization of a copyright owner. However, there are situations where uses of a protected work (either original or in translation) is permissible without the author's consent or payment of remuneration for the use of the work. Such is referred to as the "fair use".

Going through the wording of Section 12 of the Act, the doctrine of fair use will apply in news reporting and broadcasting, private and personal use and research and education. Under the said provision, the following situations are deemed lawfully, and will not constitute copyright infringement:-

- (a) *the production, translation, adaptation, arrangement or other transformation of such work exclusively for the user's own personal and private use provided that such reproduction does not conflict with normal exploitation of the work and does not unreasonably prejudice the legitimate interest of the author;*
- (b) *the inclusion, subject to mention of the source and the name of the author or quotations from such work in another work, provided that such quotations are compatible with fair practice and their extent does not exceed that justified by the purpose, including quotations for newspaper articles and periodicals in the form of press summaries;*
- (c) *the utilisation of the work by way of illustration in publications, broadcasts, programs distributed by cable, or sound or visual recordings*

for teaching, to the extent justified by the purpose or the communication for teaching purposes of the work broadcast or distributed by cable for the use in schools, education, universities and professional training, provided that such use is compatible with fair practice and that the source and the name of the author are mentioned in the publication, the broadcast, the programme distributed by cable or the recording.

3.2.4 Organs and Stakeholders Involved in the Administration of Copyright Right in Tanzania

A number of organs are involved in the administration and enforcement of copyright law in Tanzania. This part aims at highlighting such organs and their respective role:-

3.2.4.1 Copyright Society of Tanzania

Section 46 of the Copyright and Neighboring Rights Act, 1999 (hereinafter the Act) establishes Copyright Society of Tanzania (hereinafter COSOTA). Unlike in Kenya and Uganda where there is a separation of functions between collective management and regulatory matter, in Tanzania, COSOTA has a dual role, i.e. acting as a copyright office and also performs collective administration of copyright in Tanzania.

COSOTA is under an obligation of acting as a linkage between right users and right holders. Accordingly, the functions of COSOTA as listed under Section 47 of the Act includes (a) *promotion and protection of the interests of authors, performers,*

translators, producers of sound recordings, broadcasters, publishers, and, in particular, to collect and distribute any royalties or other remuneration accorded to them in respect of their rights; (b) to maintain registers of works, productions and associations of authors, performers, translators, producers of sound recordings, broadcasters and publishers⁸⁷; (c) to search for, identify and publicize the rights of owners and give evidence of the ownership of these where there is a dispute or an infringement⁸⁸; (d) to print, publish, issue or circulate any information, report, periodical, books, pamphlet, leaflet or any other material relating to copyright and rights of performers, producers of recordings and broadcasters; and (e) to advice the Minister on all matter under the Act.

For the better performance of COSOTA, as a collective society, it has statutory powers to determine the minimum rates of royalties to be levied in respect of the uses of works, to charge fees for the registered works, to join international and regional associations and sensitization of its members, the general public and institution on copyright matters (Section 48 of Act).

The overall management of COSOTA vests with the Board. The Board is headed by the Chairman of the Board. This is an individual who is expected to have knowledge and provable experience on copyright and neighboring rights. One third of the ex officio members shall be removed from their position after every two years, and

⁸⁷ In accordance with Second Schedule to the Copyright and Neighboring Rights Regulations, 2000, application for registration of a work/production costs Tshs.5,000/- (approximately USD 4/-)

⁸⁸ Prior to registration of a work, COSOTA is required do a search amongst the registered works and pending applications for purposes of ascertaining on whether there is a record in respect of the same work or productions. This is in accordance of Rule 11 of the Copyright and Neighboring Rights Regulations, 2000.

shall be replaced by private stake holders. A member who is not an ex officio shall hold office for three years. It is worth noting at this stage that the members of the Board shall not be deemed to be officers in the public service.

The power to appoint and remove a member of the Board is vested with the responsible minister. The qualification for membership of the Board is basically adequate knowledge in matter relating to copyright and neighboring rights. On the other hand, instances within which a member of the Board may be disqualified are to be found in Section 2(1) of the Schedule to the Act. These includes insolvency or bankruptcy, absence in three consecutive meetings of COSOTA without leave of the Chairman, conviction of a criminal offence, mental incapacity or imprisonment for a term of more than six months.

The members of the Board are required to sit at least four times in each year. However, the Chairman may convene an extraordinary meeting of the Board at any time. The decision of the meeting is that of the simple majority of the present members, and quorum is met by six members. The composition of the Board is constituted by the following representative groups:-

- i. The Commission of Culture;
- ii. The National Arts Council;
- iii. The Office dealing with Industrial Property;
- iv. Film Makers Association;
- v. National Museum of Tanzania;
- vi. Faculty of Law of the University of Dar es Salaam;

- vii. The Attorney Generals Chambers;
- viii. The Tanzania Authors Association;
- ix. The Tanzania Broadcasting Commission; and
- x. The Customs Department.

In the discharging of their function, the Board has powers to approve appointment of auditors to examine and audit accounts of COSOTA and appointing Copyright Administrator, upon terms and conditions that may be approved by the responsible minister. The Copyright Administrator is the Chief Executive Officer and Secretary to the Board.

The Source of funds of COSOTA includes fees payable for registration of works, grants and bequests and such other moneys or assets as may vest in or accrue to COSOTA, including government subsidy whether in the course of its function or otherwise. For the proper management of its accounts, COSOTA is required to keep proper accounts and other records relating thereto in respect of its funds, furnish the Board annually or as the Board may direct audited accounts and balance sheets and estimates of income and expenditure for the following financial year. Each financial year shall be examined and audited by auditors approved by the Board (Section 49 of the Act).

Like any other collective management organizations, COSOTA is one of the key players in the administration of copyright regulatory framework in Tanzania. However, of late, the work performance of COSOTA has not been positively

accepted by right holders in Tanzania, and on several occasions, it has been blamed for its failures to protect the Tanzanians right users⁸⁹.

3.2.5.2 The Fair Competition Commission of Tanzania

The Fair Competition Commission (FCC) is a government agency established under the Fair Competition Act, 2003⁹⁰. The intention of the Fair Competition Act is to promote and protect effective competition in trade and commerce and to protect consumers from unfair and misleading market conduct. As a consumer protection agency⁹¹, the Fair Competition has the statutory obligation of protecting consumers against counterfeit and sub-standard goods. Copyright protected works, especially software and computer programs have been victims of counterfeiting and piracy⁹².

Of recently, it was reported that the Fair Competition Commission had signed an agreement with Microsoft East Africa in order to combat pirated software⁹³. On several occasions, the Fair Competition Commission has been involved in the seizure and destruction of counterfeit goods⁹⁴.

⁸⁹ Tanzanian artists lose billions from mobile ringtone deals - available at: http://www.tech360magazine.com/2012/07/tanzanian-artistes-loose-billions-from_24.html#sthash.gzkeHNqM.dpuf.

⁹⁰ Act No. 8 of 2003

⁹¹ The functions of the Fair Competition Commission in the Fair Competition Act are very wide. The same are listed in Section 65 of the Act. It is worth noting that the Fair Competition Commission also plays a role of a consumer protection agency.

⁹² A study performed by IDC and commissioned by Microsoft has reported that 33% of all software is counterfeit. The information is available at <http://www.neowin.net/news/microsoft-study-claims-33-of-software-is-counterfeit>. See also OECD(2007), The Economic Impact of Counterfeiting and Piracy, available at <http://www.oecd.org/industry/ind/38707619.pdf>

⁹³ Online FCC Newsletter, July-September, 2012, Page 5 available at http://www.competition.or.tz/fcc_files/public/Newsletter%20July-September,%202012.pdf

⁹⁴ For instance, see Lwangili J, Tanzania; Counterfeit Goods Worth Shs.8.7 Million Seized in Dar es Salaam, Daily News, 26th July 2013, available at <http://allafrica.com/stories/201307260325.html>

3.2.5.3 The Judiciary of Tanzania

Copyright violations are enforceable in a court of law. As a result, the Tanzania judicial system forms one of the key components in the promotion of intellectual property in the region. In the area of copyright, more often courts would be called upon to determine the lawful owner of a copyright, whether a particular act amount to infringement etc.⁹⁵

3.2.6 Copyright Infringement, Enforcement, Dispute Settlement and Penalty Mechanisms

Copyright grants an author with exclusive rights over a piece of work, against the whole world. Similar to other property rights, any unauthorized acts that are likely to interfere with the economic and moral rights are enforceable and punishable in law. Technology has offered simple and convenient ways of infringing copyright like never before. Traditionally, an act of infringement is deemed to happen in the event a copyright work is reproduced, copied, transmitted, distributed to the public etc., without authorization of a copyright owner. However, with time, the scope of copyright infringement has been widened to include the manufacturing, distribution and the importation of technological devices and means that can be used to facilitate copyright infringement. In Tanzania, the relevant provisions of the law are to be found under Section 44 of the Act. The following acts are deemed illicit:-

- (a) the manufacture or importation for sale or rental of any device or means specifically designed or adapted to circumvent any device or means intended

⁹⁵ However, the copyright litigation in Tanzania has remained uncommon. Intellectual property litigation is often related to trademark and service marks. See Kihwelo P.F (1999), The Commercial Division of the High Court and the Milestones Reached in Intellectual Property Law Matters, an Article Prepared in Commemoration of 10th Anniversary of the Commercial Division of the High Court.

to prevent or restrict reproduction of a work, a sound recording or a broadcast, or to impair the quality of copies made;

- (b) the manufacture or importation for sale or rental of any device or means that is susceptible to enable or assist the reception of an encrypted program, which is broadcast or otherwise communicated to the public, including by satellite, by those who are not entitled to receive the program;
- (c) the removal or alteration of any electronic rights management information without authority;
- (d) the distribution, import for distribution, broadcasting, communication to the public or making available to the public, without authority, of works, performances, sound recordings or broadcasts, knowing or having reason to know that electronic rights management information has been removed or altered without authority.

Such acts constitute copyright infringement in strict sense, and are therefore subject to the civil and criminal sanctions. These provisions of the copyright law remain vital in this era where technological changes are very fast. This part will therefore provide for the copyright enforcement and dispute settlement mechanisms in the event there is a copyright infringement of whatever form.

In Tanzania, copyright infringement is dealt in both civil and criminal law. Within civil law, any person whose copyright is in imminent danger of being infringed or has been infringed may have a right to institute an injunctive proceedings and/or

claim damages in a court with competent civil jurisdiction⁹⁶. An injunctive order is relevant in the event the infringing acts are in a danger of repetition (Section 36 of the Act). In such a situation, an injunctive order will compel the wrongdoer to cease and stop infringement acts⁹⁷.

Again, for a claim of damages, the injured party has a statutory right to institute a claim of damages that may involve payment of any damages suffered in consequence of infringement, profits enjoyed by the wrong doer, and exemplary damages where the reputation of the injured person is prejudiced. Apart from the injunctive orders and damages, an injured party may also require the destruction of all unauthorized copyright materials (either unlawfully manufactured or distributed), to render or destroy all the equipment used for the unlawful production of copies (Section 38 of the Act). However, all these remedies can only be exercised after ownership has been legally confirmed⁹⁸.

In a criminal law administration, a copyright wrongdoer is liable for a fine not exceeding five million Tanzania shillings or to imprisonment for a term not exceeding three years, or both for the first offence, whereas ten million shillings or

⁹⁶ For a useful discussion on the pecuniary jurisdiction see Phaniel M.M, Civil Jurisdiction of the High Court of the United Republic of Tanzania, A Critical Comment on the Amendment Made by Act No.25 of 2002 and its Impact on the Pecuniary Jurisdiction of the High Court, *Journal of Law and Conflict Resolution*, Vol.(3), pp -5, March 2012 available at <http://www.academicjournals.org/jlcr/PDF/pdf%202012/Mar/Phanue.pdf>

⁹⁷ The judicial trend in Tanzania in relation to the award of injunctive orders in intellectual property cases has not been easy. This is because, in injunction proceedings, an applicant would be required to among other things establish a prima facie case. It has been observed that the Courts in Tanzania often find it difficult to interpret a “prima facie case”. See Makulilo A, Trademarks in Tanzania, the Prima Facie case and Interim Relief, in *Journal of Intellectual Property Law and Practice*, (2010), Vol.5, No.8, pp566-576

⁹⁸ The wordings on the provision relating to sanctions makes reference to “any person whose rights” and/or Authors. In this regard, in any court proceedings, the applicant will first be required to prove ownership of copyright.

to imprisonment for a term not exceeding five year or both for each subsequent offence. This is where infringement was on a commercial basis.

Depending on the circumstances of the case, and the court's discretion, a copyright wrongdoer may be liable under both private law (i.e. injunction and damages) and at the same time face criminal law sanctions.

3.3 Conclusion

This chapter aimed at providing an outlook of the existing copyright legislation in Tanzania. It started with a brief historical background of the copyright law in the territory, from the colonial era to the post-independence period. It has been observed that the colonial copyright law did not take into account the local inventions and innovations, as it was only meant to protect the interests of colonial book writers. However, after the independence, the law was on several occasions amended/and or replaced until now where we have the Copyright and Neighboring Rights Act, 1999. It is worthwhile important to note that the English copyright law has to the greatest extent shaped and influenced the local copyright legislation.

CHAPTER FOUR

4.0 MARKET ANALYSIS OF COPYRIGHT RELATED INDUSTRIES IN TANZANIA

The world is now witnessing a significant growth of copyright related industries in different parts of the world. In demonstrating the increasingly significance of copyright, (and intellectual property in general) in the area international trade and commerce, the recent study by UNCTAD(2013)⁹⁹ has categorized intellectual property into the same group with the likes of tax competition policy, access to land, labor market etc. in the formulating a favorable environment for trade and investment. This is undoubtedly due to the fact that copyright related industries are vital tools for innovation, employment creation and national economy. This chapter will examine the various socio-economic and legal circumstances may influence the growth of copyright-related industries in Tanzania.

4.1 The Need of Defining Copyright-Related Industries

The study of copyright has attracted considerable attention of various scholars, particularly the economists. This is because there has been an ongoing debate on whether intellectual property regulation can boost innovation and national economy. As a result, there is an increasingly demand of statistical data to appreciate or otherwise the role of intellectual property in national economy.

In response to such needs, the WIPO in 2003 formulated the “Guide on Surveying the Economic Contribution of the Copyright-based Industries” (the WIPO Guide).

⁹⁹ See UNCTAD (2013), World Investment Report, 2013-Global Value Chain: Investment and Trade for Development available at http://unctad.org/en/PublicationsLibrary/wir2013overview_en.pdf.

The intention of the WIPO Guide has been expressed as outlining a methodology for identifying the contribution of copyright- based industries to the national economy, employment and foreign trade, and therefore providing better understanding of the role played by intellectual property in the economic development.

One of the inventive features of the WIPO Guide is the definition and classification of “copyright-based industries”. These includes:-

(a) Core Copyright-based Industries

These are defined as industries that are more closely identified with copyright than others. The following nine groups of core copyright industries are recommended by the study:- press and literature; music, theoretical productions, operas, motion picture and video, radio and television, photography, software and databases, visual and graphic arts; advertising services and copyright collective management services¹⁰⁰.

(b) Interdependent Copyright-based Industries

These are described as industries that are engaged in production, manufacture and sale of equipment whose function is wholly or primarily to facilitate the creation, production or use of works and other protected subject matter. The interdependent copyright-based industries are further divided into two, i.e. core interdependent copyright industries, which includes manufacturing wholesale and retail (sales and rental) of TV sets, radios, VCRs, CD Players, DVD Players, Cassette Players,

¹⁰⁰ Ibid

Electronic Game equipment and musical instruments and interdependent copyright industries that covers manufacture, wholesale and retail (sales and rental) of photographic and cinematographic instruments, photocopies, blank recording material and paper¹⁰¹.

(c) Partial Copyright-based Industries

These are referring to industries in which a portion of the activities is related to works and other protected subject matter and may involve creation, production and manufacturing, performance, broadcast, communication and exhibition or distribution and sales. The lists includes apparel, textiles and footwear, jewellery and coins, other crafts, furniture, household goods, china and glass, wall coverings and carpets, toys and games, architecture, engineering , surveying, interior design and museums¹⁰².

(d) Non-dedicated Support Industries

These are defined as industries in which a portion of the activities is related to facilitating broadcast, communication, distribution or sales of works and other protected subject matter, and whose activities have not been included in the core copyright industries. The list includes general wholesale and retailing, general transporting and telephony and internet¹⁰³.

The WIPO Guide has already been brought into test in various national economies.

In 2012, it was reported that over 40 countries around the world had made use of the

¹⁰¹ Ibid

¹⁰² Ibid

¹⁰³ Ibid

WIPO Guide, of which by then, 30 studies were completed and published)¹⁰⁴. For instance, in 2007, Jamaica conducted an economic survey on the contribution of copyright-based industries, where it was reported that the copyright related industry had contributed up to 4.8% of the Jamaica's GDP, most of which came out of core copyright sector and had accounted for 3.03% of all employment¹⁰⁵. At this stage, it is worth noting that the WIPO's classifications of copyright-related industries in their totality are falling within the scope of copyright protection in Tanzania. The WIPO's guide therefore provides a useful kit for assessing the contribution of copyright related market to the Tanzanian economy.

4.2 The Nature and Significance of Copyright Law

Throughout history, copyright law has been shaped in order to protect and safeguard the interests of right holders¹⁰⁶. The law provides for the minimum requirements for protection, whilst at the same time attempting to address the existing challenges. For instance, the English Statute of Anne was meant to provide a better system of regulation and protection to authors, in order to encourage and promote what was referred to as "*to compose and write useful books*", through recognition and protection of copyright. Another good example is the Berne Convention which was enacted in order to "*.....protect, in as effective and uniform a manner as possible, the*

¹⁰⁴ See WIPO(2012), WIPO Studies on the Economic Contribution of the Copyright Industries, available at www.wipo.int/export/sites/www/ip-development/en/creative_industry/pdf/economic-contribution-analysis-2012-pdf

¹⁰⁵ The report is available at http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_ja.pdf

¹⁰⁶ See Depoorter B, Technology and Uncertainty: The Shaping Effect on Copyright Law, University of Pennsylvania Law Review, Vol.157:1831 available at <https://www.law.upenn.edu/live/files/78-depoorter157upalrev18312009pdf>

*rights of authors in their literary and artistic works...*¹⁰⁷, as by then, the absence of uniformity of copyright rules was one of the challenges, and a bar towards the development of copyright.

Despite the fact that copyright law continue to be shaped and drafted at the international arena (i.e. the TRIPS Agreement, the Berne Convention etc.), an effective copyright regulation of a particular country has to be a true reflection of the existing socio-economic conditions.

In the various parts of the world, such as the U.K and the U.S, there are attempts of shaping copyright law in order to accommodate the fast changing technologies, particularly through the internet. For instance, in the UK and the US, new laws have been enacted to accommodate the new technological challenges. This is because; there is an increasingly number of copyright violations. According to OFCOM (2012), it was reported that 16% of the UK internet users have consumed illegal content online¹⁰⁸.

However, without much of a research, copyright infringement in Tanzania is more conducted offline, rather than online. It is very common in Tanzania to see pirated copyright content sold openly in the streets. In a country where it is dominated by the offline copyright infringement, there is no rush at regulating online infringement. It is for the best interests for the existing legal framework to address the existing challenges to adequate levels.

¹⁰⁷ See first recital to the Berne Convention.

¹⁰⁸ Facts available at <http://media.ofcom.org.uk/2012/11/20/half-of-internet-users-unsure-if-content-is-legal/>, accessed on 29th July 2013

A proper regulation of copyright protection in Tanzania should not mean to make copyright owners super rich, but rather guarantee adequate and equitable share of ones' labor. This will only be achieved in an environment where the law is shaped to address the existing socio-economic challenges.

4.3 Growth Indicators for Copyright-Related Industries in Tanzania

4.3.1 The Increasing Use of Swahili Language

It is an acceptable rule of law that copyright does not protect ideas, but rather protects expression of ideas in a tangible form. The expression of ideas would often be communicated/expressed using a particular language. In this regard, language provides important mechanisms for enabling expression of ideas in an acceptable manner. In the words of Kilgour (1999)¹⁰⁹, *language is obviously a vital tool. Not only is it a means of communicating thoughts and ideas, but it forges friendships, cultural ties, and economic relationships (emphasis added).*

The recent days have witnessed an increasing use and popularity of Swahili language in several parts of the world. To date, Swahili language is broadcasted in various international media houses such as the British Broadcasting Corporation¹¹⁰, the Voice of America¹¹¹, the Deutsche Welle¹¹² etc. According to the University of Virginia¹¹³, Swahili language and culture is taught in more than 100 universities in different parts of the world. The language has also featured in “Liberian Girl”, a hit

¹⁰⁹ The Remarks by the Honorable David Kilgour, P.C., M.P. Edmonton Southeast Secretary of State (Latin America and Africa) Southern Alberta Heritage Language Association Calgary, October 9, 1999 available at <http://www.david-kilgour.com/mp/sahla.htm>

¹¹⁰ <http://www.bbc.co.uk/swahili/>

¹¹¹ See www.voaswahili.com

¹¹² See <http://www.dw.de/idhaa-ya-kiswahili/s-11588>

¹¹³ <http://faculty.virginia.edu/swahililanguage/Where%20it's%20Spoken.html>

made by the legendary pop artist, the late Michael Jackson.

Without much of a research, the English language copyright content has so far dominated the world entertainment and technology markets. For instance, the US and UK music, movies, software has been traded across borders. The use of English language has thus proved beneficial to the US and the UK economies. The growing popularity of Swahili language may offer also offer a favorable environment for the growth of copyright related industries in Tanzania, mainly through steady market for Swahili copyright content across the Swahili speakers. A Swahili piece of music, cinema, a book can easily be sold across borders.

4.3.2 Population and the Growing Economy

Various reports suggest that Africa is now the fastest growing continent in the world. According to the AFDB¹¹⁴, the growth in the continent's low-income countries exceeded 4.5 per cent in 2012 and is forecast to remain at above 5.5 in the next few years. Africa's collective gross domestic product (GDP) reached US \$953 while the number of middle income countries on the continent rose to 26, out of a total of 54. For the past years, the continent has witnessed the middle class growing to 34% of the entire African population¹¹⁵.

As a country, Tanzania has also recorded a positive growth of its national economy. The country is experiencing a steady economic growth, at an annual rate of 6% and

¹¹⁴ Africa is now the Fastest Growing Continent in the World, Press Release available at <http://www.afdb.org/en/news-and-events/article/africa-is-now-the-fastest-growing-continent-in-the-world-12107/>. See also <http://www.bbc.co.uk/news/business-23267647>

¹¹⁵ Ibid

7%¹¹⁶, with a middle class constituting 12% of the entire population. Currently, the Tanzania's population stands at 44.9 million¹¹⁷.

It has been pointed out that the Africa's middle class is a key source for private growth. This is because it accounts for much of the effective demand for goods and services supplied by private sector¹¹⁸. This is a class which can afford to purchase a movie DVD, a music CD, a piece of art work etc.

4.3.3 The Political Stability in Tanzania

Since its independence in 1961, Tanzania has remained politically stable. Without exerting much effort, the logical argument is that political stable is no doubt key to economic growth. This is because an unstable government is likely to reduce trade and investment. According to the IMF Working Paper, political instability significantly reduces economic growth, both statistically and economically¹¹⁹.

4.3.4 The Increasing Number of Radio and Television Stations in Tanzania

The recent years have witnessed an increasingly number of radio and television stations in Tanzania. According to TCRA (2006)¹²⁰, radio and television stations increased from 14 to 47 and 10 to 29, respectively between 2000 and 2006.

¹¹⁶ Ibid

¹¹⁷ See the United Republic of Tanzania (2013), Population Distribution by Administrative Units, Key Findings, 2012 Population and Housing Census available at <http://www.nbs.go.tz/sensa/PDF/2012%20PHC%20POPULAR%20VERSION.pdf>

¹¹⁸ AFDB(2011) The Middle of the Pyramid: Dynamics of the Middle Class in Africa, Market Brief available at http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/The%20Middle%20of%20the%20Pyramid_The%20Middle%20of%20the%20Pyramid.pdf

¹¹⁹ Aisen, A and Veige F.J (2010) How Does Political Instability Affect Economic Growth, IMF Working Paper, available at <http://www.imf.org/external/pubs/ft/wp/2011/wp1112.pdf>

¹²⁰ Information available at www.tcra.go.tz/index.php/component/content/article/2-tcra/60-broadcasting-services-2000-2006

The increasing number of media houses in Tanzania has a role to play in the growth of copyright market (particularly musical works and audiovisual works. This is because, in accordance with Rule 3 of the Copyright (Licensing of Public Performances and Broadcasting) Regulations, 2003, it is restricted to hold a public license or broadcasting of a work in which a copyright subsists except under a license issued by COSOTA. One of the conditions for a grant of a license is the payment of fees corresponding to the appropriate tariff. However, despite the existence of this restriction, it has been reported that radio and television broadcasters in Tanzania are not paying royalties for broadcasting copyright work. An effective collective management organization is of the importance in the enforcement of the law.

4.3.5 The Increasing Number of Mobile Users

As of March 2013, the TCRA reported that Tanzania had a total of 27,428,903 mobile users¹²¹. The increasing number of mobile users in Tanzania may provide room for the growth of copyright market through ringtones and caller tune. In other parts of the world, ringtones and caller tunes have generated significant revenue. In a 2005 report, it was indicated that the ringtone market accounted for between 6% and 10% of music industry revenues worldwide¹²². In India, it is reflected in the below quote:-

“Advisory firm BDA estimates the Indian VAS market will grow from \$1.5 billion in 2008 to \$7.8 billion by 2013. But over half of that are SMS

¹²¹ Information available at <http://www.tcra.go.tz/images/documents/telecommunication/telecomStatsMarch13.pdf>, accessed on 29th July 2013

¹²² See http://www.forbes.com/2005/08/01/ringtone-sales-flat-cx_vnu_0801ringtone.html, accessed on 29th July 2013.

revenues. BDA figures that of the remaining, over 55 percent is made up by just one product — the ubiquitous caller tune, the music you hear when you call someone”¹²³ [emphasis added].

In the preceding part, an examination on the various socio-economic factors that are likely to boost copyright-related industries was done. Tanzania has favorable conditions for the growth of copyright related markets. It is of no doubt that the increasing use of Swahili language across borders, population and the growing economy together with political stability, the high number of media houses and mobile users may provide favorable conditions for the sustainable growth of copyright-related industries. In their totality, they do provide a vast market, generate revenue, the inflow of FDI and stable environment of doing business and trade.

¹²³ <http://forbesindia.com/article/work-in-progress/how-this-man-grabs-you-by-the-caller-tune/3322/1#ixzz2aQFVIItBW>

CHAPTER FIVE

5.0 SUMMARY OF FINDINGS AND RECOMMENDATION

This part aims at summarizing findings and recommendations in response to the research questions. Throughout this work, it is the researcher's contention that copyright related industries have not been effectively utilized in Tanzania, and that an effective regulatory framework is vital in the transformation of the existing copyright market in Tanzania into becoming an operational tool of achieving economic growth through innovation and employment generation.

5.1 Presentation of Findings

Firstly, the copyright-related matters in Tanzania are regulated by the Copyright and Neighboring Rights Act [Cap 218 of 2002] together with its regulations there under. One of the general objectives of the copyright law is expressed to *"make better provisions for protection of copyright and neighboring rights in literary, artistic works and folklore and for related matter"*, in order to promote innovation and economic growth. Indeed, the law contains the better provision on copyright related matters. This is because Tanzania is one of the signatories to the Berne Convention. As such, the law was enacted in compliance with the provisions of the Berne Convention. Original literal and artistic works, including music works, databases, software and computer programs etc. are thus copyright protected.

Secondly, there is a government's commitment in creating a favorable environment for the operation of a functional copyright-related market in Tanzania. It is beyond doubt that for the past decade, Tanzania has made considerable achievement in

regulating copyright market (i.e. accession to Berne Convention on 25th July 1994¹²⁴, and five years thereafter (in 1999), enacting the Copyright and Neighboring Rights Act in compliance to the Berne Convention). Thirdly, most of the ongoing Government's initiatives on transforming copyright in Tanzania are politically made, fail to address the existing challenges and are often lacking merits. This can be demonstrated by the following facts:-

Little commitment and/or lack of seriousness on copyright related matters amongst its key stakeholders. An overview of the various parliamentary reports and hansards has revealed little knowledge and/or lack of seriousness on the part of government officials and members of parliament, the same people who have been entrusted by law to oversee and administer copyright matters and making laws. This may be demonstrated by the following:-

In accordance with Section 51(2) and Rule no.1 of the Schedule, the responsible minister (currently ministry of industry and trade) is responsible for appointing Board Members of COSOTA. During session no.20 of the parliamentary seating no.21, the responsible minister was asked as to why COSOTA didn't have a legally constituted Board at COSOTA for quite some time¹²⁵. In response to the question, the then Honorable Minister had this to say:-

“....lakini nafikiri kuna mlolongo mrefu au utaratibu ambao bodi inapaswa ipitie ili wajumbe wale na mwenyekiti waweze kuisimamia COSOTA”

¹²⁴See http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15, accessed on 24th July 2013.

¹²⁵ Hansard available at www.parliament.go.tz/inex.php/sessions/contribution/1009/2005-2010/118.

When translated to English

".... But I think there is a long process by which the appointed members and chairman of the Board must comply in order to be able to oversee and manage COSOTA".[Emphasis added].

Another good example is to be found in the Permanent Parliamentary Committee on Social Welfare-Report on the Activities of the Committee between April 2011 to April 2012¹²⁶, at page 12, the report had this to say:-

Mheshimiwa Spika, Kutokana na utafiti huu, Kamati inataoa maoni yafuatayo:-

- i. N/A
- ii. *Serikali kupitia Mamlaka ya Mapato Tanzania (TRA) isimamie kuhakikisha wazalishaji, wasambazaji na watumiaji wa kazi za sanaa wanalipa mirahaba kwa mujibu wa Sheria. Vinginevyo Serikali itaendelea kupoteza mapato mengi ambayo yangesaidia katika kuinua uchumi wa nchi;*
- iii. N/A
- iv. N/A
- v. *Kamati inashauri kuwa usimamizi wa COSOTA uwe chini ya Wizara ya Habari, Vijana, Utamaduni na Michezo badala ya Wizara ya Viwanda na Biashara kama ilivyo sasa. Utaratibu huu utasaidia ufuatiliaji wa karibu na utekelezaji mzuri kwani Wizara ya Habari, Vijana, Utamaduni na Michezo ndio haswa Wizara yenye dhamana husika na sanaa na wasanii kwa ujumla;"*

¹²⁶ Report available at www.parliament.go.tz/docs/report/76e41-hosiana-nkamia-2nd-draft.doc

When translated to English

“Mr. Speaker, based on this study, the Committee recommends the following: -

- i. N/A
- ii. *“Government through the Tanzania Revenue Authority (TRA) has to ensure manufacturers, distributors and right users of literal and artistic pay royalties in accordance with the law. Otherwise, the Government will continue losing much revenue that would help in reviving the country's economy”*
- iii. N/A
- iv. N/A
- v. *The Committee recommends that the supervision of COSOTA be under the Ministry of Information, Youth, Culture and Sports instead of the Ministry of Industry and Trade. This will facilitate close monitoring and effective implementation, as the Ministry of Information, Youth, Culture and Sports Ministry is mainly responsible with matters of arts and artists in general; [Emphasis Added].*

With all due respect, the above two quotations from the minister and members of the house demonstrates little knowledge and/or lack of seriousness on essential matters under their control. It is very surprising to hear from the minister that there was no Board in place because of the procedural issues that are under the control of the minister. With regards to the second quotation from the members of the parliamentary committee, it is clear that the statutory body with the task of collecting royalties is COSOTA. It is also surprising for the committee to advise the Tanzania

Revenue Authority (which is basically a tax body) to perform the statutory obligations of COSOTA.

Little knowledge on the scope of copyright protection among the government officials, members of the parliament and the general public. In accordance with the Berne Convention, copyright subsists to literal and artistic works. These include books, music, computer programs, database etc. However, in Tanzania, little knowledge on the clear scope of copyright protection has been demonstrated amongst the government officials, members of parliament and the public at large on the scope of copyright protection. Copyright protection in Tanzania has often been interpreted to only protect arts, music and entertainment in general. Yet, they are the ones who are pushing COSOTA to have sensitization programs to the general public on copyright law issues. Perhaps, this demonstrates further as to why copyright related matters in Tanzania are taken lightly, if not politically. This may be supported by the following data:-

- a. Following a review of hansards¹²⁷ and parliamentary reports available at www.parliament.go.tz, as of 25th July 2013, reference to copyright protection amongst members of parliament and ministers is limited to music, movies, arts and entertainment in general. They are often making reference to a Swahili phrase “*sanaa na wasanii*” which when interpreted in English means “arts and artists”). In technical terms, a computer programmer cannot be referred to as artists.

¹²⁷ The research made review of twelve contributions by the members of parliament and ministers respectively that were related to copyright. In all of these, the scope of discussion is limited to arts, music, movies and entertainment in general. These are between 2006-2012.

- b. The reports made by the members of parliament and ministers (i.e. reports of the permanent parliamentary committees and budget estimates) on anti-piracy initiatives are limited at video tapes and audio CDs [for instance see response made by the then Minister of Industries, Trade and Marketing during session no.4 of question no.322¹²⁸. See also Report made by the Permanent Parliamentary Committee on Social Welfare¹²⁹ and budget estimates for the Ministry of Industry and Trade for the financial year 2012/2013¹³⁰.
- c. The proposals made by the members of parliament and the permanent parliamentary committee to place COSOTA under the Ministry of Youth, Sports and Culture instead of Ministry of Industry and Trade. This proposal follows the misconception on the scope of copyright law, where is it only associated with arts and entertainment.

Limited financial resources; as it was pointed out earlier, COSOTA operates as a copyright office and as a collective management organization. In accordance with Section 49 of the Copyright legislation in Tanzania, the source of funding of COSOTA solely lies on fees collected from members, grants and government subsidy.

During the presentation of the budget estimates for 2013/14 of the Ministry of Industry and Trade, it was reported that COSOTA had registered 12,013 (i.e. 9830 as musical works, 737 film works and 51 published works), and had collected Tshs

¹²⁸ Available www.parliament.go.tz/index.php/sessions/questions/1576/2012-2015/1

¹²⁹ *ibid*

¹³⁰ www.parliament.go.tz/docs/04eb-WIZARA-YA-VIWANDA-NA-BIASHARA.pdf

98.8/- million as royalties. COSOTA is authorized to take up to 30% of the collected royalties as administration fees (pursuant to Copyright (Licensing of Public Performances and Broadcasting) Regulations, 2003). This amount is very minimal to run the affairs of COSOTA. Again, COSOTA depends on Government's subsidy, which is also of very minimal. For instance, in the financial year 2005/2006, COSOTA was allocated with a budget of Tshs.110 Million only¹³¹. With this limited budget, still COSOTA is expected to take sensitization programs, perform collective management of rights, counter piracy etc.

Fourthly, the existing socio-economic and legal framework in Tanzania has potential to facilitate the growth of copyright-related markets in Tanzania. These include the rising popularity of Swahili language, the Tanzanian population, the growing economy, particularly the increasing growth of the middle class. Fifthly, it has been observed that COSOTA is not operated on principles of good governance, accountability and transparency and lacks sufficient representation of its members. This is supported by the following:-

- a) Currently, there isn't a legally constituted Board since 6th June 2013¹³². The process of appointing the Board of Members is unnecessarily long and cumbersome. Notice of appointment of any member of the Board has to be published in the Gazette. Only God knows how long it takes to cause notice of such appointment to be published in the Gazette!

¹³¹ See Parliamentary Session no.4, Seating No.38 of 7th August 2006 available at www.parliament.go.tz/index.php/sessions/contribution/1330/2005-2010/7

¹³² www.cosota.tz.org/?section=about&page=members

- b) The annual reports on the activities of COSOTA are not made publicly available. The same for annual audited financial reports.
- c) The law states that Board Members shall not by virtue only of their appointment to the Society, be deemed to be officers in the public service (Rule 1(6) of the Schedule to the Copyright and Neighboring Rights Act, 1999). This is because they are not regarded as members of public service (hence not accountable to the rules and code of conduct(s) of the civil services. On the other hand, COSOTA being a creature of statute, the common law duties enshrined in the Tanzanian Companies Act, 2002 won't apply in the circumstances. The accountability of the Board Members remains unclear.

The copyright owners in Board of COSOTA lack adequate representation. It is obvious that collective societies should be operated for the interests of the copyright owners. In this regard, there needs to be adequate representation of copyright owners in the decision making bodies. Rule 1(1) provides composition of the Board. Such includes:-the Commission of Culture; the National Arts Council; the Office dealing with Industrial Property; the Film Makers Association; the National Museum of Tanzania; the Faculty of Law of the University of Dar es Salaam; the Attorney Generals Chambers; the Tanzania Authors Association; the Tanzania Broadcasting Commission; and the Customs Department. How are a computer programmer and a database owner represented in this Board? Any decision of the Board is to be reached by simple majority! The composition of the Board is evidence on the little understanding of the scope of copyright protection amongst its key stakeholders.

Sixthly, the relevance of the international copyright rules and good practice from international organizations and few selected jurisdiction to Tanzania may be classified into two, namely (i) immediate and long term basis.

5.1.1 Immediate Basis

Most of the reported copyright infringement in Tanzania is in relation to video tapes, CDs, DVDs etc, and is mainly done offline. One of the commonest form of infringement is through the selling of pirated CDs, video tapes, DVDs etc. In Tanzania, it is not unusual to see illegally copyright content sold openly in the streets. Any immediate legislative attempts should focus on combating offline copyright infringement.

5.1.2 Long Term Basis

Copyright legislation in the world has been shaped by international law since 1886, when the Berne Convention was enacted. Since then, copyright law has been shaped by international instruments, the likes of WIPO Copyright Treaty, the TRIPS Agreement etc in order to achieve uniform regulation. In this regard, the Tanzanian legislation, just like any other jurisdiction will continue to be influenced by the international rules of law.

Seventhly, the performance of COSOTA has not been impressive in front of its stakeholders. On several occasions, it has been blamed for poor performance especially in the collection of royalties. The set-up, performance and the functions of COSOTA needs to be relooked.

5.2 Recommendations

a) The Need of Reforming COSOTA

At this stage, it is already clear as to the importance of collective management organization. The effective operation of COSOTA is key to the sustainable growth of copyright-related industries in Tanzania. In order for this to be achieved, the following is proposed:-

i. Separation of Functions

As pointed out earlier, currently COSOTA performs dual functions, i.e copyright office and collective management organization. It is our proposal that the two functions be separated, and COSOTA to remain as a copyright office only. One of the functions as a copyright office should be the licensing and regulating collective management organization. This can be achieved as follows:-

Collective management of copyright should be left to privately owned organizations, to be formed by the right owners themselves. The law should be amended to this effect.

Under this proposed arrangement, COSOTA will assume the role of a regulator for collective management organization.

The members will therefore be authorized to form their own collective management organization, provided one organization is created for each copyright category. Among the criteria and/or rules for operating as a collective management organization shall be as follows:-

- i. A not for profit entity registered under the Companies Act, 2002. This is because the Companies Act, 2002 incorporates adequate provisions that are aiming at ensuring good governance, among others includes the common law duties of directors.
- ii. That the organizations be created and operated by the members themselves. The decision making bodies should also have adequate representation of right owners.
- iii. The appointment of the board of directors and management team should be conducted on competitive basis.
- iv. Having rules of ensuring transparency such as publishing financial reports and annual activities reports, accounts to be regularly audited by the approved reputable audit firms.
- v. Coming up with standard documents (such as articles of association, code of conducts) that have been drafted in order to ensure the interests of the right owners.

The following are the advantages of the proposed arrangement:-

- i. Reducing the government burden in operating and maintaining COSOTA as a collective management organization. Such organization(s) will thus be operated as private entities, and will not depend on the government subsidy as their source of funding.
- ii. The operation of these organizations will rely on the application fees for registration of members and administrative costs for handling collection of royalties. Having a considerable number of members will automatically

reduce operating costs, through collection of application fees and administration costs. In this regard, it is up to the collective organization to undertake sensitization and awareness amongst the members of the public, in order to attract a good number of members.

b) Education to Key Stakeholders (Particularly Members Of Parliament)

There is a need of having education and awareness programs to key stakeholders of copyright, particularly the members of parliament, ministers and other key stakeholders. This group plays a key role in many respects. The world is moving so fast in terms of technology and innovation. As such, the policy and law makers will often be called upon to legislate on complex and technical matters. There should therefore be deliberate initiatives that will be geared to train and educate this group.

c) The Need to Undertake Comprehensive Study on the Role of Copyright Protection, and Intellectual Property in General

Throughout the growth of copyright protection, (and intellectual property in general) in Tanzania, copyright legislation has been shaped by external forces, without taking into consideration the local circumstances. Initially, copyright law came with the colonialist. Soon after the independence, the law on copyright law was slightly amended. Again, the existing Act was also a result of external forces, mainly to comply with the Berne Convention.

Despite the fact that copyright law will continue to be shaped by the international law, particularly the TRIPS Agreements, it is high time that the government initiates

a comprehensive study on the state, role, need and challenges of intellectual property market in Tanzania.

5.3 Conclusion

The growth of copyright law in Tanzania is of importance towards the growth of the national economy through employment creation and encouraging innovation. The Tanzanian government has taken considerable steps in regulating copyright law following the enactment of the Copyright and Neighboring Rights Act, 1999, which is basically compliant to the Berne Convention. However, there are few matters on copyright law in Tanzania that are not well addressed which are basically a result of the fast changing technology (i.e. liability of internet service providers, peer-to-peer technologies etc.).

There is a need of having education and awareness programs amongst key stakeholders, particularly the members of parliament and the ministers. These play a key role in many respects. We are moving fast in terms of technology, and from time to time, they might be called upon to legislate on complex and technical matters. There should therefore be deliberate initiatives at this particular group. Probably, this is a group that has to demonstrate sufficient knowledge on the subject, compared to any other group.

The capacity and performance of COSOTA is questionable. The organization has failed to meet the expectations of its stakeholders and the public in general. An effective performance of COSOTA can be attained by the separation of its functions

of a copyright office and a collective management organization. An effective operation of collective societies in Tanzania will definitely create a competitive copyright environment and guaranteeing equitable returns to right owners.

The discussion of this work emphasizes the need of making few reforms (which have been referred to as immediate reforms) in order to change and shape the copyright market in Tanzania. There is no point of rushing at enacting provisions on online infringement such as peer-to-peer, liability of internet service providers etc. whilst the existing framework has failed to combat the offline infringement. It is not unusual thing to see pirated CDs are sold freely in the street of Dar es Salaam. First things first!!, create an effective framework to combat offline infringement before rushing to online infringement.

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